D

108-243

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 193.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON MARKET COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 6, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 193.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON MARKET COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print
Declaration	1	1
Bill of particulars	4	2
Summons and return of marshal	6	3
Plea of defendant	7	4
Joinder	7	4
Notice of trial	7	4
Order to calendar	8	4
Defendant's second plea	8	5
Demurrer to second plea	12	7
Joinder in demurrer	13	7
Demurrer overruled	14	7
Judgment on demurrer	15	8
Judgment of general term	16	8
Leave granted to amend declaration	16	8
Replication	16	8
Verdict and judgment, June 9, 1879	17	8
Motion for new trial	17	9
Bill of exceptions	18	9
Extract from act of Congress incorporating Market Company	18	9
Copy of receipt	19	10
Copy of notice	20	10
Extract from act of Congress, March 3, 1873	20	11
Memorandum of agreement between government and board of public works with Market Company	21	11
Deed Market Company to District of Columbia	24	13
Extract from act of legislative assembly District of Columbia	27	15
Resolution of legislative assembly District of Columbia	28	15
Extract from act of legislative assembly, June 26, 1873	31	17
Writ of error	33	18
Citation	33	18
Clerk's certificate	34	18

1 *Declaration.—Filed Nov. 23, '75.*

Supreme court of the District of Columbia.

THE DISTRICT OF COLUMBIA, PLAINTIFF, *vs.* THE WASHINGTON MARKET COMP'Y, DEFENDANT.	At law. No. 14991. Declaration.

RECORD.

The plaintiff, a body corporate for municipal purposes, under and by virtue of an act of Congress approved February 21, 1871, entitled "An act to provide a government for the District of Columbia," sues the defendant, a body corporate under and by virtue of an act of Congress approved May 20, 1870, entitled "An act to incorporate the Washington Market Company," for money payable by the defendant to the plaintiff.

1. For that by said act of Congress approved February 21, 1871, the charter of the city of Washington was repealed on and after the first day of June, 1871, and upon the repeal of said charter the plaintiff was declared to be the successor of said corporation. By said act of Congress, approved May 20, 1870, it was enacted that, in consideration of the privileges granted by said last-named act to the defendant, the defendant
2 should pay yearly, every year during the term of ninety-nine years in said act named, unto the said city of Washington, the sum of twenty-five thousand dollars, which sum should be received by said city and set apart and expended, by and under the direction of said city, for the support of the poor of said city; and that said city might enforce the payment of said sum from time to time as the same should become due, either by an action at law or by the same proceedings then enacted by law for the collection of taxes by said city. And said defendant accepted the provisions and conditions of said act of Congress of May 20, 1870. And by reason of the premises, from January 1, 1871, to May 31, 1871, the defendant became indebted to said city of Washington, at said rate of twenty-five thousand dollars per annum, in the sum of $10,416.67, but did not pay the same or any part thereof excepting the sums of $2,000, paid February 7, 1871; $2,002.35, paid March 6, 1871; $3,000, paid March 14, 1871, and $2,500, paid May 17, 1871, and a credit of $741.12 for licenses refunded under authority of an act of the city council; leaving a balance from the defendant in favor of said city of Washington of $173.20, which sum is now due from the defendant to the plaintiff, or successor of said city. But the defendant, though often thereunto requested, hath not paid the same or any part thereof.

2. And for that, by reason of the premises, from June 1, 1871, to November 1, 1875, the defendant became indebted to the plaintiff as successor of said city of Washington in the sum of $173.20, being a balance due from the defendant to the said city of Washington on June 1, 1871; and from June 1, 1871, to November 1, 1875, the defendant became also indebted to plaintiff as successor of said city of Washington in the sum of $110,416.66, being at the rate of said sum of twenty-five thousand dollars per annum, but did not pay the same or any part thereof except-

ing the sums of $5,206.32, paid December 23, 1871; $2,000, paid February 3, 1872; $2,500, paid February 26, 1872; $2,500, paid February 27, 1872; $1,500, paid May 7, 1872; $1,204, paid May 8, 1872;
3 $8,971.41, paid August 21, 1872; $2,000, paid November 16, 1872; $1,000, paid November 27, 1872; $3,000, paid February 8, 1873; $3,000, paid March 7, 1873; $3,597.21, paid March 29, 1873; $1,875, paid July 8, 1873; $1,875, paid October 1, 1873; $500, paid December 4, 1873; $1,509.25, credit for hay scales sold December 31, 1873, and not delivered; $1,375, paid January 3, 1874; $1,875, paid April 1, 1874; $500, paid June 15, 1874; $1,382.44, paid July 9, 1874; $1,875, paid October 20, 1874; $1,875, paid December 28, 1874; $1,875, paid March 9, 1875; $1,875, paid June 30, 1875; $1,875, paid October 1, 1875.

3. For money payable by the defendant to the plaintiff, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims the sum of $53,847.23, with interest on $173.20 from June 1, 1871; on $10,089.68 from June 1, 1872; on $3,431.38 from June 1, 1873; on $15,993.75, from June 1, 1874; on $17,492.56, from June 1, 1875; and on $6,666.66, from November 1, 1875, according to the particulars of demand hereto annexed, besides costs of suit.

EDWIN L. STANTON,
Attorney for Plaintiff.

4 *Bill of particulars.—Filed Nov. 3rd, 1875.*

COMPTROLLER'S OFFICE, D. C.,
November 3, 1875.

Washington Market Company, in account current with the District of Columbia.

On account late corporation of Washington.		Debit.	Credit.
o franchise rental under charter, from January 1, 1871, to May 31, 1871, at the rate of $25,000 per annum		$10,416 67	
1871.			
By cash February 7	$2,000 00		
" March 6	2,002 35		
" " 14	3,000 00		
" May 17	2,500 00		
			$9,502 35
Licenses refunded under authority of an act of city council			741 12
Balance due late corporation of Washington			173 20
		$10,416 67	$10,416 67
Debt due late corporation of Washington		$173 20	
To franchise rental under charter, from June 1, 1871, to November 1, 1875, at the rate of $25,000 per annum, a period of 4 years and 5 months		110,416 66	
1871.			
By cash December 23			$5,206 32
1872.			
By cash February 3			2,000 00
" " 26			2,500 00
" " 27			2,500 00
" May 7			1,500 00
" " 8			1,204 00

Washington Market Company, &c.—Continued.

On account late corporation of Washington.	Debit.	Credit.
" August 21		8,971 41
" November 10		2,000 00
" " 27		1,000 00
1873.		
By cash February 8		3,000 00
" March 7		3,000 00
" " 29		3,597 21
" July 8		1,875 00
" October 1		1,875 00
" December 4		500 00
Hay scales, December 31, (sold, not delivered)		1,506 25
1874.		
By cash January 3		1,375 00
" April 1		1,875 00
" June 15		500 00
" July 9		1,382 44
" October 20		1,875 00
" December 28		1,875 00
1875.		
By cash March 9		1,875 00
" June 30		1,875 00
" October 1		1,875 00
Balance November 1, 1875		53,847 23
	$110,589 86	$110,589 86

To balance due District of Columbia, November 1, 1875, $53,847 23.

5 The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

EDWIN L. STANTON,
Attorney for Plaintiff.

6 *Summons to answer.*

In the supreme court of the District of Columbia.

THE DISTRICT OF COLUMBIA, PLAINTIFF,
vs.
THE WASHINGTON MARKET COMPANY, DEFENDANT. } At law. No. 14991.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show, why he should not have judgment against you for the cause of action stated in his declaration.

Witness: D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Ass't Clerk.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.
E. L. STANTON.

Return of marshal.

Served copies of the declaration, notice to plead, and this summons on the defendant, N. G. Ordway, pres. of company, the 1st day of Dec'r, 1875.

ALEX. SHARP,
Marshal.

7 *Plea of def't.—Filed Jan'y* 11, 1876.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

The defendant says that it never was indebted as alleged.

JOSEPH H. BRADLEY,
BENJ. F. BUTLER,
WM. E. CHANDLER,
Counsel for Defendant.

Joinder on plea.—Filed Feb. 5, 1876.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

The plaintiff joins issue upon the defendant's plea.

EDWIN L. STANTON,
Attorney for District of Columbia.

Notice of trial.—Filed Feb. 5, 1876.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

Take notice that the issue joined in this cause will be tried at the next term of this court.

EDWIN L. STANTON,
Attorney for Plaintiff.

To JOSEPH BRADLEY, Esq.,
Of Counsel for Defendant.

8 *Order to calendar.—Filed Feb.* 5, 1876.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

The clerk will please place above case on calendar for next term of court.

EDWIN L. STANTON,
Attorney for District of Columbia.
Plaintiff's Attorney:
EDWIN L. STANTON.
Defendant's Attorneys:
JOSEPH H. BRADLEY,
BENJAMIN F. BUTLER.
WILLIAM E. CHANDLER.

Date of last pleading, January 11, 1876.

Second plea.—Filed April 6, 1876.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

DEFENDANT'S PLEA.

And for a further plea, the defendant says that subsequent to the passage of said act of Congress of the 20th of May, 1870, that is to say, on the 3d day of March, 1873, the Congress of the United States passed a further act appropriating such sum for the purchase by the United States of the interest of the District of Columbia in the city hall building in Washington, then used solely for government purposes, as might be determined by three impartial appraisers to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the
District offices. And in and by said act, the governor and board of
9 public works of said District were authorized, if they deemed it advisable for the purpose of the erection of such buildings, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets; which land, so authorized by said act to be procured, was a portion of the land granted to the defendant company by said act of May 20, 1870, in consideration of which said sum of twenty-five thousand dollars was to be paid annually to said city of Washington; that subsequently, that is to say, on the 18th day of March, 1873, in pursuance of said act of Congress of March 3, 1873, an agreement was entered into by said District of Columbia, represented by said governor and board of public works, with said defendant company, by which, among other things, said company agreed that it would, by quit-claim deed, release and convey to said District, for the purpose of the erection of said District building thereon, all the right, title, and interest of said company acquired under said act of May 20, 1870, in and to so much of the land described in said act, and fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, as was described in said agreement, being a piece of eighty-six feet in depth, along said avenues and between said streets; and said defendant company also agreed to convey to said District the right to use in common with said company, as a passageway and court-yard, all the land between the said land so to be released and conveyed as aforesaid and a line drawn from Seventh to Ninth streets ten feet north of the Seventh and Ninth street buildings of said market company; that in and by said agreement the said District of Columbia, among other things, in consideration of the aforesaid release and conveyance by said defendant company, agreed with said company that said District would assume and fulfil all obligations imposed upon said company by section fourteen of said act of May 20, 1870 (as modified by an act of the legislative assembly of the District, of August 23, 1871), except as follows: That the market company should pay annually
10 to the District during the tenure and for the purpose mentioned in said section fourteen, the sum of seven thousand five hundred dollars, payable quarterly, which sum should, during said term, be in the place of all rental fee of the ground occupied by the market

buildings of said company; and that in case in any year the general District taxes upon said ground and market buildings should exceed five thousand five hundred dollars, the excess above that amount should be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for rental and taxes should not exceed thirteen thousand dollars; that it was also provided in said agreement that possession of the land conveyed should be given the District upon the day of executing said agreement; that said agreement should take effect April 1, 1873, and that the defendant company should at once settle its past rental account to said April 1 at the rate, after August 23, 1871, fixed by the resolution of the legislative assembly of that date, and should immediately pay the balance due to the treasurer of said District. That in pursuance of said agreement of March 18, 1873, said defendant company, by deed of release of that date, conveyed to said District all said company's interest in said land and privileges, as in and by said agreement was required, which said deed was duly accepted by said District and recorded; possession of said land was delivered to and taken by said District, and the work of erecting said District building commenced by said District, and possession of said land has ever since been and now is retained by said District.

That the value of the interest of the District in said city hall building having been determined by appraisers selected by the Secretary of the Interior, under said act of March, 1873, at seventy-five thousand dollars, said sum was duly paid by the United States to the District, was accepted by the District legislature, and said legislature, by act of June 26, 1873, appropriated said sum and fifteen thousand dollars in addition, making ninety thousand dollars in all, to be drawn by the board of public works
for the erection of said building for District offices, from which
11 appropriation payments were made for the work of erecting said building on said land, as aforesaid. That under the aforesaid act of May 20, 1870, there was granted to said defendant company all the land fronting Pennsylvania and Louisiana avenues between Seventh and Ninth streets, and extending southerly to the middle of B street, before that time known as reservation seven or Centre Market space, with the provision that on the rear of said grounds should be erected public market buildings, and that on the front grounds should be erected a building to be rented by said company for stores, offices, and other lawful purposes, to be determined by said company; that prior to said agreement of March 18, 1873, said market buildings were duly erected and opened, and occupied, as required by said act of May 20, 1870; that said front grounds were valuable to said company for the purpose of erecting said building for rental, as aforesaid, and its rights therein were released and conveyed to said District only at the solicitation of the District officers, in pursuance of said act of March 3, 1873, and in consideration of said agreement by said District to assume and fulfil all obligations imposed upon said company by said section fourteen of said act, except the payment by said company of said annual sum of seven thousand five hundred dollars; that immediately upon the execution of said agreement of March 18, 1873, said defendant company settled its past rental account, and paid all amounts due to said date, and that since said date said company has duly paid to said District said sum of seven thousand five hundred dollars annually, as required by said agreement.

Wherefore, and by reason of all which the premises, the defendant says that the plaintiff ought not to be admitted to say as in declaring said plaintiff has alleged.

JOSEPH H. BRADLEY,
Attorney for the Defendant.

12 *Demurrer to second plea.—Filed April 21st, 1877.*

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

The plaintiff says that the defendant's second plea is bad in substance.

EDWIN L. STANTON,
Attorney for District of Columbia.

NOTE.—Some of the matters of law intended to be argued are—

(1.) That the act of the legislative assembly in said plea mentioned does not reduce the annual rental required by act of Congress to be paid by the defendant.

(2.) That the legislative assembly had no authority to so reduce said annual rental.

(3.) The defendant did not and could not make a valid conveyance of the land alleged in said plea to have been conveyed by the defendant to the plaintiff, said land being held by the defendant under a statutory lease from the United States and subject to certain trusts.

(4.) Neither the board of public works nor the District of Columbia was authorized by the act of March 3, 1873, in said plea mentioned, to buy the land alleged in the plea to have been bought from the defendant, the reversion of said land being in the United States.

13 *Joinder in demurrer.—Filed Dec. 15, 1877.*

DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET CO. } 14991. At law.

The defendants say that the plea is good in substance.

JOS. H. BRADLEY,
Their Attorney.

14 *Decree spec. term overruling demurrer, Dec. 31, 1877.*

THE DISTRICT OF COLUMBIA, PLAINTIFF,
vs.
THE WASHINGTON MARKET CO., DEFENDANT. } At law. No. 14991.

Upon argument of the plaintiff's demurrer to the defendant's plea, it is considered that said demurrer be, and the same is hereby, overruled. (13 Min. Sup. C. D. C., p. 290.)

15 *Judgment on demurrer, Jan'y* 12, 1878.

THE DISTRICT OF COLUMBIA, PLAINTIFF,
vs.
THE WASHINGTON MARKET CO., DEFENDANT. } At law. No. 14991.

Now comes here the defendant, by its said attorneys, and moves for judgment on the demurrer, which is granted. Therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defence and have execution thereof, from which plaintiff prays an appeal to the general term. (13 Min. Sup. C. D. C., p. 327.)

Calendared for general term.

16 *Gen. term, order affirming judgment on demurrer, Mar.* 3, 1879.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET CO. } At law. No. 14991.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court here that there was no error in the judgment of the circuit court in overruling the demurrer in said cause, now, therefore, it is considered that the said judgment be, and the same is hereby, affirmed, and that defendant recover against the plaintiff its costs about its defense aforesaid expended March 3, 1879. (3 M., G. T., p. 296.)

DISTRICT OF COLUMBIA
vs.
WASHINGTON MARKET CO. } At law. 14991.

APR. 9TH, 1879.

And now comes the plaintiff, by its attorney, Francis Miller, and moves the court for leave to amend the entry of judgment of March 3rd, 1879, by allowing the plaintiff to amend its declaration as it may be advised, and the same is granted.

Replication.—Filed Apr. 10, 1879.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET CO. } At law. 14991.

The plaintiff joins issue upon the defendant's pleas.

A. G. RIDDLE,
Attorney for Pl'tf.

17 *Judgment.—Filed June* 9, 1879.

THE DISTRICT OF COLUMBIA, PLAINTIFF,
vs.
THE WASHINGTON MARKET CO., DEFENDANT. } At law. No. 14991.

Now comes here, as well as the plaintiff, by its attorney, Mr. Riddle, as

the defendant, by its attorneys, Messrs. Butler and Bradley, and a jury of good and lawful men of this district, to wit, August L. Ockert, Charles A. Buckey, Walter Godey, Horace B. Howse, John H. Small, David Atkins, Charles F. Wilkins, Granville F. Hyde, David S. Reed, Samuel H. Plumly, James W. Drayne, and Joseph W. Davis, who, being duly sworn to try the issue above joined, on their oath say they find said issue in favor of the defendant. Therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense, taxed at $, and have execution thereof. (14 Min., 596.)

Motion for new trial on exceptions.—June 12, 1879.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

And now comes the plaintiff and files this its motion to set aside the verdict, and grant a new trial upon exceptions taken at the hearing hereof. (15 Min., 3.)

18 *Bill of exceptions.—Filed July* 7, 1879.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

Now again comes here the plaintiff, by its attorney, Mr. A. G. Riddle, and tenders to the court here its bill of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made part of the record, which is done accordingly. (15 Min., p. 61.)

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

BILL OF EXCEPTIONS.

Be it remembered, that upon the trial of this cause the plaintiff, to maintain the issues upon its part joined, read to the court and jury from the act of Congress, approved May 20, 1870, incorporating the defendant, the fourteenth section thereof, as follows:

"SEC. 4. And be it further enacted, That in consideration of the privileges granted by this act to the Washington Market Company, the said company shall pay, yearly, every year during the said year term of ninety-nine years, unto the city of Washington the sum of twenty-five thousand dollars, which sum shall be received by said city, and set apart and expended by and under the direction of the city government of said city for the support and relief of the poor of said city and of the District of Columbia; and said city may enforce the payment of said sum from time to time as the same shall become due, either by an action at law or

19 by the same proceedings now authorized by law for the collection of taxes by said city."

And to further prove the issues upon its part joined, the plaintiff offered and gave evidence to the jury tending to show that said company was in the possession of the premises, upon which by said act of incorporation they were empowered to build and locate a market, and that they built a market thereon.

And to further maintain and prove the issues upon its part joined, the plaintiff offered to prove that the defendant while in possession of said premises, charged and collected, of certain occupants of temporary sheds thereon from January 1, 1871, to the time of the destruction of such sheds, a certain amount of money paid by them to said defendant on account of the poor fund, and for such purpose plaintiff offered to put in evidence receipts given by the defendant to such an occupant in the words and figures following, to wit:

OFFICE OF THE WASHINGTON MARKET COMPANY,
January 16, 1871.

Pursuant to the vote of the board of directors (see other side), the following sums have been assessed upon stand No. 214, occupied by G. M. Oyster, for the month of February, 1871:

For rent to be paid to the city of Washington for the support of the poor	$4 25
For interest on improvements, taxes, insurance, and running expenses	2 00
For gas	25
Total amount	$6 50

Payable at the office of the company in advance.

N. G. ORDWAY,
For the Building Committee.

FEBRUARY 16, 1871.
Received payment.

E. D. TOWN,
For the Company.

20 (Indorsed:)

WASHINGTON, *January* 1, 1871.

At a meeting of the board of directors of the Washington Market Company, holding this day, it was voted unanimously that Mr. N. G. Ordway, under the direction of the building committee, be authorized to assess upon the occupants of the stands in the temporary market buildings a sufficient sum to cover the rent due the city of Washington, interest, insurance, and taxes on the said buildings, and the running expenses, and to collect the rents monthly, commencing January 1, 1871.

A true copy.
Attest:

BENJ. D. WHITNEY,
Clerk of Directors.

Notice.

"Occupants of stalls and stands failing to pay the amount assessed against them within five (5) days from the receipt of this notice, will be understood to have waived all claim to such stall or stand and the fixtures thereon, and will not be allowed longer to occupy the same."

And the plaintiff also offered to prove orally, by stall-holders in the defendant's market, that the defendant has continued to collect, on receipts similar to the foregoing, sums of money from them from the first occupation by it of the premises down to the beginning of this suit.

But the justice presiding at said trial refused to allow the plaintiff to make such oral proof of said receipts, to which refusal of the court the plaintiff, by its attorney, excepted, and the exception was noted by the court upon its minutes. And here the plaintiff rested.

And thereupon, the defendant, to maintain the issues upon its part joined, read to the court and jury from the act of Congress, approved March 3, 1873, making appropriations to supply deficiencies, &c., the following:

21 "For the purchase by the United States of the interest of the District of Columbia in the present city hall building in Washington, now used solely for government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said district only for the erection of a suitable building for the District offices; and the governor and board of public works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: Provided, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon, for such building."

And to further prove the issues upon its part joined, the defendant offered and read in evidence to the jury a memorandum of agreement admitted by plaintiff to have been duly executed by the parties thereto at the date therein mentioned in the words and figures following:

Memorandum of agreement—Governor and board of public works with the Washington Market Company.

In pursuance of the act of Congress of March 3, 1873, authorizing the governor and board of public works, if they deem it advisable, for the purpose of erecting thereon a suitable building for District offices, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, it is hereby agreed that—

1. The Washington Market Company shall by good and sufficient quit-claim deed release and convey to the District of Columbia all the
22 title and interest of said company, acquired under act of Congress of May 20, 1870, incorporating said company, in and to so much of the land within said District described in section two of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the fol wing limits:

Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly lines of Pennsylvania and Louisiana avenues, and thence on a line parallel with the aforesaid southerly side of Pennsylvania avenue to the westerly line of Seventh street, at a point eighty-six feet from the corner began at; thence northerly along the west line of Seventh street eighty-six feet, to the corner began at.

The Washington Market Company shall also, in said deed, convey to said District the right to use in common with said market company, as a passage-way and court-yard, all the land between the lot conveyed in said deed and a line drawn westerly from Seventh to Ninth street, ten feet north of the north walls of the present Seventh and Ninth street buildings of said market company.

2. In consideration of the aforesaid release and conveyance by the Washington Market Company to the District of Columbia, the District will assume and fulfil all obligations imposed upon the company by section fourteen of said act of May 20, 1870 (as modified by act of the legislative assembly of the District of August 23, 1871), except as follows:

The market company shall pay annually to the District of Columbia during the term and for the purpose mentioned in said section
23 fourteen, the sum of seven thousand five hundred dollars, payable quarterly, which sum shall during said term be in the place of all rental for the ground occupied by the market buildings of said company; and in case in any year the general District taxes upon said ground and market buildings shall exceed five thousand five hundred dollars, the excess above that amount shall be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for rental and taxes shall not exceed thirteen thousand dollars; the District, however, not hereby releasing, but expressly reserving, and the market company hereby confirming the right of the District, given by section two of the act of May 20, 1870, of fixing and controlling, for the protection of the market dealers and of the public, the amount of rentals of the stalls and stands in said market buildings; and it is also hereby agreed that the annual rental of stalls and stands in the other markets in the city of Washington shall not be fixed by the District authorities at a lower rate per square foot of area than seventy per cent. of the rate fixed under said section for stalls and stands in the market buildings of said company; and the District shall not use the land released and conveyed as aforesaid for the purpose of a market.

This agreement shall take effect April 1, 1873, and the market company shall at once settle its past rental account to that time at the rate since August 23, 1871, fixed by the resolution of the legislative assembly of that date, and shall immediately pay the balance due the treasurer of the District.

Possession of the land conveyed shall be given the District upon the day of executing this agreement.

Dated at Washington, March 18, 1873.

WASHINGTON MARKET COMPANY,
By M. G. EMERY, *President.*
H. D. COOKE, *Governor.*
ALEX. R. SHEPHERD,
JAMES A. MAGRUDER,
S. P. BROWN,
ADOLF CLUSS,
Board of Public Works.

24 And to further prove the issues upon its part joined, defendant offered evidence tending to prove that in pursuance of said agreement, and on said 18th day of March, 1873, said defendant made and delivered to said board of public works the deed to said District of Columbia mentioned in said agreement, and that said deed was, on the 22d day of March, 1873, delivered for record to the recorder of deeds of said District and by him duly recorded, and defendant read in evidence to the jury a recorder's copy, duly certified according to law as correct, of said deed, in the words and figures following, to wit:

Indenture.

This indenture, made this 18th day of March, A. D. 1873, between the Washington Market Company, a corporation duly organized under act of Congress of May 20, 1870, and doing business in Washington, in the District of Columbia, of the first part, and the District of Columbia of the second part, witnesseth:

That the said party of the first part, for and in consideration of divers agreements on the part of said District this day made, and of one dollar in lawful money of the United States to it in hand paid by the said party of the second part, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, its successors and assigns forever, the following described real estate, situated in the city of Washington, District of Columbia, to wit, all the right, title, and interest of said party of the first part, acquired under act of Congress of May 20, 1870, incorporating said company, in and to so much of the land within said District described in section two of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the following limits:

25 Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly lines of Pennsylvania and Louisiana avenues; and

thence on a line parallel with the aforesaid southerly side of Pennsylvania avenue to the westerly line of Seventh street at a point eighty-six feet from the corner begun at; thence northerly along the west line of Seventh street to the corner begun at: Together with the right to said District of Columbia to use in common with said party of the first part, as a passage-way and court-yard, all the land between the lot above described and a line drawn westerly from Seventh to Ninth street ten feet north of the north walls of the present Seventh and Ninth street buildings of said party of the first part; together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the remainders, reversions, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise however of the said party of the first part, of, in, to, or out of the said piece or parcel of ground and premises: To have and to hold the said piece or parcel of ground, and premises and appurtenances, unto the said party of the second part, its successors and assigns, to their sole use, benefit, and behoof forever. And the said party of the first part, for itself and for its successors and assigns, hereby covenants, promises, and agrees to and with the said party of the second part, its successors and assigns, that the said party of the first part, and its successors, shall and will warrant and forever defend the said piece or parcel of ground, and premises, and appurtenances, unto the said party of
26 the second part, its successors and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through said party of the first part, its successors or assigns; and further, that the said party of the first part, and its successors, shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, its successors or assigns, make and execute all such other deed or deeds or other assurances in law for the more certain and effectual conveyance of the said piece or parcel of ground, and premises, and appurtenances, unto the said party of the second part, its successors or assigns, as the said party of the second part, its successors or assigns, or their counsel learned in the law, shall advise, devise, or require.

In testimony whereof the said party of the first part has hereunto set its hand and seal or the day and year first hereinbefore written.

THE WASHINGTON MARKET COMPANY,
M. G. EMERY, *President.*
MOSES KELLY, *Treasurer.*

(Duly authorized.)

Signed, sealed, and delivered in the presence of—
[SEAL.] E. McB. TIMONEY.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

I, Edward McB. Timoney, a notary public in and for the District and county aforesaid, in the said city of Washington, do hereby certify that Mathew G. Emery, president, and Moses Kelly, treasurer, of the Washington Market Company, party of a certain deed, bearing date on the 18th day of March, A. D. 1873, and hereto annexed, personally appeared be-

fore me, in the city of Washington aforesaid, the said Emery and Kelly being personally well known to me to be the persons who executed
27 the said deed, and acknowledged the same to be their act and deed and the act and deed of said Washington Market Company.

Given under my hand and notarial seal this 18th day of March, A. D. 1873.

[SEAL.] (Signed) E. McB. TIMONEY,
Notary Public.

(Indorsement:) Deed Washington Market Company to the District of Columbia. 9.30 a. m. Received for record March 22, 1873, and recorded in liber No. 712, folio 291 et seq., one of the land records for the District of Columbia, and examined by S. Wolf, recorder. Geo. F. Schager, deputy.

And to further prove the issues upon its part joined, defendant offered and read in evidence to the jury from the act of the legislative assembly of the District of Columbia, approved June 26, 1873, making appropriations to defray the ordinary and contingent expenses of the government of the District, &c., the following:

"For the erection of a suitable building for the District offices, under the direction of the governor and board of public works, ninety thousand dollars; provided, that seventy-five thousand dollars of this amount shall be drawn from the United States Treasury, in accordance with appropriation made by the act of Congress approved March third, eighteen hundred and seventy-three, entitled 'An act making appropriations to supply deficiencies in the appropriations for the service of the government for the fiscal year ending June thirtieth, eighteen hundred and seventy-three, and for other purposes;' and the governor is hereby authorized to draw said appropriation from the United States Treasury and deposit the same in the treasury of the District of Columbia, to be used for the purposes herein named. And provided further, that the appropriation hereby made shall be drawn by warrant of
28 the board of public works and applied by them in the erection of a building for the District offices and for no other purpose whatever, fifteen thousand dollars."

And to further prove the issues upon its part joined, defendant offered and read in evidence to the jury a resolution of the legislative assembly in the words following, to wit:

"[No. 11.] A resolution in relation to the Washington Market Company.

"Be it resolved by the legislative assembly of the District of Columbia, that the governor be authorized and required to act as one of the commissioners of the Washington Market Company, under the resolution of Congress approved December twenty, eighteen hundred and seventy; and that he be requested to procure such alterations in the plan of the buildings to be erected by said company as shall transfer the proposed hall from the Ninth-street wing to the main building on Pennsylvania avenue, and also to secure a reduction from twenty-five thousand dollars to twenty thousand dollars of the annual rental required to be paid by said

company, and which is now assessed by the company upon the stall-holders.

"Approved, August 23, 1871."

To which testimony the plaintiff by its attorney objected; but the court overruled the objection, to which holding the plaintiff by its attorney excepted, and the exception was noted by the court upon its minutes.

To further maintain the issues upon its part joined, the defendant offered and read in evidence to the jury a copy, duly certified according to law, of the proceedings of the Secretary of the Interior, appointing appraisers, and of their fixing the value of the interests of the District of Columbia in the City Hall building at seventy-five thousand dollars ($75,000), to which testimony the plaintiff by its counsel objected; but the court overruled the objection, and allowed said testimony to be given to the jury, to which holding of the court the plaintiff by its attorney excepted, and the exception was noted by the court upon its minutes.

29 To further maintain the issues upon its part joined, the defendant offered and gave evidence to the jury tending to prove that immediately upon the execution of said agreement of March 18, 1873, said defendant settled with the proper officers of said District of Columbia its part rental account on the terms and in the manner fixed in said agreement, and paid to the treasurer of said District the balance agreed in said settlement to be due from the defendant to said District; that defendant had paid its said rental account from and including March 18, 1873, to April 1, 1873, at the rate of $20,000 per annum. Defendant further gave in evidence a letter dated April 1, 1873, signed officially by the comptroller at that date of said District, and addressed to said defendant, acknowledging that defendant had settled and paid to said District all amounts due from defendant on rental account up to said April 1, 1873. Defendant further proved that from said last date to the date of this suit it has paid to the plaintiff, on account of said rent, at the rate of $7,500 annually; that immediately subsequent to the date of said agreement and execution and delivery of said indenture, conveying to the plaintiff the property fronting on Pennsylvania avenue, between Seventh and Ninth streets northwest, in the city of Washington, District of Columbia, the plaintiff took possession of the ground between said limits, and made excavations for a foundation for a building for offices for the District of Columbia, but had not proceeded more than a few days in excavating before the work was stopped; that the defendant has not from the date of said indenture been in possession of or exercised any power or authority over the ground so conveyed, or any part thereof.

And the plaintiff, in rebuttal, offered to show, by the oath of a professional accountant, that he had recently examined certain books of account in the possession of said District, and purporting to be its regular books of account, and that in said books there were entries showing that on the 1st day of April, 1873, there was $1,527.57 due from the market

30 company to the plaintiff, and that upon the basis of $25,000 from January 1, 1871, to August 23, 1871, and $20,000 from August 23, 1871, to April 1, 1873. But the court refused to allow the evidence to go to the jury, to which refusal the plaintiff, by its attorney, excepted, and the exception was noted by the court upon its minutes.

And here the plaintiff rested.

The plaintiff then asked the court to give the following instructions to the jury:

"That the plaintiff is entitled to recover from the defendant the sum of $25,000 per annum from the 1st day of January, 1871, when the company took possession, down to the 1st day of April, 1873."

But the court refused to grant said instruction as prayed; to which refusal the plaintiff, by its attorney, then and there excepted, and the exception was noted by the court upon its minutes.

And thereupon the court instructed the jury that "this case had been taken to the general term upon demurrer to the special plea; that the general term had overruled the demurrer, and as defendant had produced testimony under every part of the special plea, and plaintiff had produced none whatever in rebuttal, the duty of the jury, in his opinion, was to find a verdict for the defendant."

To which ruling and instruction the counsel for the plaintiff then and there duly excepted, and the exception was noted by the court upon its minutes.

All the hereinbefore exceptions were taken by counsel for plaintiff and noted by the court upon its minutes before the rendering of the verdict.

And the counsel for the plaintiff presents this its bill of exceptions, containing the said opinions and directions, and requests the juctice who presided at the trial of said cause to sign the same and put his seal thereto, which is accordingly done now for then, this 17th day of September, 1879.

ANDREW WYLIE. [SEAL.]

31 *Appropriation for the building of District offices.*

In the supreme court of the District of Columbia, general term, No. 22.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON MARKET COMPANY. } At law. No. 14991.

An act making appropriation to defray the ordinary and contingent expenses of the several departments of the government of the District of Columbia, and prescribing the limits thereof, and fixing penalties for their violation.

* * * * * * * *

For the erection of a suitable building for the District offices, under the direction of the governor and board of public works, ninety thousand dollars: Provided, That seventy-five thousand dollars of this amount shall be drawn from the United States Treasury, in accordance with appropriation made by the act of Congress, approved March third, eighteen hundred and seventy-three, entitled "An act making appropriations to supply deficiencies in the appropriations for the service of the government for the fiscal year ending June thirtieth, eighteen hundred and seventy-three, and for other purposes;" and the governor is hereby authorized to draw said appropriation from the United States Treasury, and deposit the
32 same in the treasury of the District of Columbia, to be used for the purposes herein named: And provided further, That the appro-

priation hereby made shall be drawn by warrant of the board of public works and applied by them in the erection of a building for the District offices, and for no other purpose whatever, fifteen thousand dollars.

Approved June 26, 1873.

(Acts of 3d leg. ass., p. 71.)

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

[SEAL.] Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The District of Columbia, plaintiff, and The Washington Market Company, defendant, No. 14991, at law, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 12' day of February, in the year of our Lord 1880, and of the Independence of the United States the 104.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To The Washington Market Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Feb'ry 12, 1880. Service of writ of error accepted.

WILLIAM BIRNEY,
Attorney for the Washington Market Co.

34 *Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writ-

ings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 4th day of March, 1880.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 193. The District of Columbia, plaintiff in error, vs. The Washington Market Company. District of Columbia sup. court. Filed 6th March, 1880.

(Stamped:) Office Supreme Court U. S. Filed Mar. 6, 1880. D. W. Middleton, clerk.

108-243

IN THE

Supreme Court of the District of Columbia.

Tuesday, March 6, 1883. Met pursuant to adjournment. Present: Chief Justice Cartter and Justices Hagner and Cox.

* * * * * *

At Law—No. 14991.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
THE WASHINGTON MARKET COMPANY.

On motion of the plaintiff, by its attorney, Francis Miller, it appearing to the court here that its order in this cause of April 9, 1879, is recorded in its proper place in the third volume of the minutes of this court, page 334, in the following words: "And now comes the plaintiff, by its attorney, Francis Miller, and moves the court for leave to amend the entry of the judgment of March 3, 1879, by allowing the plaintiff to amend its declaration as it may be advised, and the same is granted."

Whereas the order was and should have been entered in the following words:

And now comes the plaintiff, by its attorney, Francis Miller, and moves the court for leave to amend the entry of the judgment of March 3d, 1879, by allowing the plaintiff to plead as it may be advised, and the same is granted. And the court now orders that its order in said cause be certified to the Supreme Court as part of the record in said cause.

A true copy.

[SEAL.]

Test: R. J. MEIGS, *Clerk.*
By R. J. MEIGS No. 3,
Assistant Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.
IN GENERAL TERM.

WEDNESDAY, *February* 4, 1880.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter and Justices MacArthur and James.

* * * * * *

At Law—No. 14991.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
THE WASHINGTON MARKET COMPANY, Defendant.

And now come here as well the plaintiff as the defendant, by their respective attorneys; and thereupon, because it appears to the court here that there is no error in the record and proceedings, or in the judgment of the special term at law, it is considered that its said judgment be, and the same is hereby, affirmed with costs.

A true copy.

Test: R. J. MEIGS, *Clerk.*
By R. J. MEIGS No. 3,
Assistant Clerk.

108-243

OFFICE SUPREME COURT U. S.
FILED
MAR 12 1883
JAMES H. McKENNEY, CLK.

Supreme Court of the United States

OCTOBER TERM, 1882.

No. 193.

THE DISTRICT OF COLUMBIA,
PLAINTIFF IN ERROR,

vs.

THE WASHINGTON MARKET COMPANY,
DEFENDANT IN ERROR.

In error to the Supreme Court of the District of Columbia.

OPENING BRIEF FOR THE PLAINTIFF IN ERROR.

HENRY E. DAVIS,
For Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 193.

THE DISTRICT OF COLUMBIA,
PLAINTIFF IN ERROR,

vs.

THE WASHINGTON MARKET COMPANY,
DEFENDANT IN ERROR.

In error to the Supreme Court of the District of Columbia.

OPENING BRIEF FOR THE PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

On May 20, 1870, the defendant in error, The Washington Market Company, was duly incorporated by act of Congress, (16 Stats., 124.) That act granted the company certain privileges, including the right, on certain specified conditions, to occupy for a term of ninety-nine years, and erect buildings upon, certain premises, the property of the United States, in the city of Washington. Among the provisions of the act is one, (section 14,) that in consideration of the privileges granted, the company should pay yearly, *every year during the said term of ninety-nine years*, unto the city of Washington the sum of $25,000 for the support and relief of the poor of said city and the District of Columbia;

and by the same section authority was given the city to enforce payment of that sum, either by action at law or by the same proceedings authorized by law for the collection of taxes by the said city. (Rec., pp. 1, 9, 10.)

The plaintiff in error is in law the same as the city of Washington mentioned in the act, having succeeded to all its rights, powers, and privileges, (16 Stats., 419; 18 do., 116; 20 do., 102,) and the obligations and liabilities of the company to the District are the same as formerly to that city.

The company not having made payment of the said annual sum of $25,000 for the period from January 1, 1871, to November 1, 1875, the District, on November 23, 1875, commenced action in the Supreme Court of the District of Columbia against the company, seeking to recover the amount so due, at that rate, for that time, subject to certain credits duly set forth. (Rec., pp. 1–3.)

The declaration is in three counts. The first claims $10,416.67 as the proportionate sum due from January 1 to May 31, 1871, subject to certain credits, which leave a balance due of $173.20. The second claims the said sum of $173.20, as also the further sum of $110,416.66, as due from May 31, 1871, to October 31, 1875, subject to certain credits, leaving the balance claimed, $53,847.23. The third contains the common money counts, and sets forth the amount claimed, with a statement of the portions thereof due on specified dates, from which interest is asked on the respective portions. To the declaration is annexed a bill of particulars, setting out the account in detail.

On the ground on which the company was to erect its new buildings, as provided by the act of incorporation, there were, at the passage of the act, certain buildings which were to be paid for by the company in a specified manner, and removed, (sec. 10.) The company having assumed its corporate functions, and the old buildings having not yet been removed, an extensive fire came to its aid; in consequence of which Congress, on December 20, 1870, adopted a joint resolution, constituting the respective chairmen of the

Senate and House Committees on Public Buildings and Grounds, *with the Mayor of Washington*, commissioners to require the company (1) promptly to furnish temporary market accommodations for the market men who had been driven out by the fire, and (2) to erect at the earliest possible day the first stories or market portions of the market buildings provided for by the act of incorporation. This resolution further authorized the said *commissioners to make* such alterations in the buildings, (the plans and specifications for which are part of the act of incorporation, 16 Stats., 128,) and such arrangements with the company as might be best calculated to secure the speedy erection of appropriate buildings; it being provided, however, that the passage of the resolution should not be construed to affect, in any way, investigations into the affairs of the company then pending. (16 Stats., 589.)

On February 21st, following, (1871,) Congress passed the organic act providing the territorial form of government for the District, and by section 40 of that act the charter of the city of Washington was repealed, and all its corporate offices abolished from June 1, 1871. (16 Stats., 419.)

The Legislative Assembly provided for by the last-mentioned act having duly convened, and there no longer being a Mayor of Washington, to act as one of the commissioners under the joint resolution of Congress, of December 20, 1870, above set forth (*ante*, pp. 2–3,) a resolution was adopted by the Assembly, and on August 23, 1871, duly approved, authorizing and requiring the Governor of the District to act as one of those commissioners, (designated by this resolution as "Commissioners *of* the Washington Market Company,") and further requesting the Governor thus designated *to procure* certain specified alterations in the plans of the buildings, and also *to secure* a reduction of the company's annual "rental" from $25,000 to $20,000. (Acts Leg. Ass'y, D. C., part 2, p. 169.) This resolution, which also informs us that the company was assessing the $25,000 on the stall-

holders, was doubtless honestly conceived by the Asssembly as consistent with the interests of the District as against the company; especially in the light of section 29 of the organic act, which provides that the Assembly should define by law who should be entitled to relief as paupers in the District, and provide for the support and maintenance of such paupers *by taxation*. (16 Stats., 425.)

The record discloses no action whatever by the commissioners under the Congressional joint resolution.

By the act of Congress of March 3, 1873, making appropriations to supply deficiencies, &c., (17 Stats., 540,) a sum not exceeding $75,000, to be determined by appraisers, was appropriated for the purchase by the United States of the District's interest in the City Hall building in the city of Washington, the said sum to be applied by the District only for the erection of suitable buildings for its offices; and the paragraph of the act making this provision concludes as follows:

"And the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure* sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and *no land, or the use thereof*, is hereby granted for the purpose of erecting any building thereon, for such building."

Thereupon, fifteen days later, viz., on March 18, 1873, an "arrangement" was made by the Governor and Board, in the form of an agreement with the Market Company, the material and relevant provisions of which are as follow (Rec., pp. 11–13):

1. The company to release and convey to the District the interest acquired by it, the company, under its act of incorporation, in and to a designated portion of the land described

therein, and fronting on Pennsylvania and Louisiana avenues; and also to convey to the District the right to use, in common with itself, a certain passage-way and court-yard.

2. The District "*to assume and fulfill all obligations* imposed upon the company by section 14 of said act of May 20, 1870, (as modified by act of the Legislative Assembly of the District, of August 23d, 1871,) except as follows," viz: (*a*) The company to pay annually to the District, during the term and for the purpose mentioned in the said section 14, the sum of $7,500, payable quarterly, *the said sum to* "*be in the place of all rental for the ground occupied by the market buildings of said company;*" and, (*b*) In case in any year the general District taxes upon the said ground and buildings should exceed $5,500, the excess above that amount to be deducted from said rental of $7,500, so that the total annual payments *for rental and taxes* should not exceed $13,000.

3. The agreement to go into effect April 1st, 1873, and the company at once to settle and pay its past rental account to that time, *at the rate*, since August 23d, 1871, *fixed* by the resolution of the Legislative Assembly of that date; and

4. Possession of the land conveyed to be given the District on the day of execution of the agreement.

It may be stated, in passing, that of the five gentlemen constituting the Governor and Board, who made this "arrangement," three appear by the record as original incorporators of the company.

Finally, the sum of $75,000 having been duly determined as the value of the District's interest in the City Hall (Rec., p. 16), the Legislative Assembly, by act of June 26, 1873, appropriated for the erection of a suitable building for the District offices, $90,000, of which amount $75,000 were to be drawn from the United States Treasury, in accordance with

the act of Congress of March 3d, 1873, above-mentioned. (Acts of 3d Leg. Ass'y, 71; Rec., pp. 17, 18.)

The company settled with and paid the District at the rate of $20,000 *per annum* to April 1st, 1873, and from April 1st, 1873, it paid at the rate of $7,500 *per annum*.

Such having been the course of events, the company, when sued by the District, pleaded the general issue, and also filed a special plea (Rec., p. 5), reciting, (1) the act of Congress of March 3d, 1873, authorizing an arrangement by the Governor and Board of Public Works, to secure land on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets; (2) *that the land so authorized to be procured was a portion of the land granted the company by its act of incorporation*, in consideration of which the said annual sum of $25,000 was to be paid; (3) the agreement of March 18th, 1873; (4) the indenture of that date, the acceptance and recording thereof, possession of the land thereby conveyed, commencement of its building, and continued possession and retention by the District; (5) the determination of the District's interest in the City Hall at $75,000, the payment of that sum by the United States, receipt thereof by the District, and the act of Assembly of June 26th, 1873; (6) that by its act of incorporation there was granted the company all the land fronting Pennsylvania and Louisiana avenues, between Seventh and Ninth streets and extending southerly to the middle of B street, with provision for the erection on the rear thereof of public market buildings, and on the front grounds, of a building to be rented by the company for stores, offices, &c.; (7) that prior to said March 18, 1873, the said market buildings were duly erected, opened, and occupied; (8) that the said front grounds were valuable to the company for the purpose of erecting the said building for rental, and its rights therein were released and conveyed to the District only at the solicitation of the District officers, in pursuance of the act of March 3d, 1873, and *in consideration of the obligations and conditions agreed to by the District* by the memorandum of March 18, 1873; and

(9) that immediately on the execution of the said agreement the company settled its past rental account, and paid all amounts due to said date, and since said date has duly paid to the District the said sum of $7,500 annually, as required by the said agreement.

To the plea of the general issue the District replied, and to the special plea demurred, the demurrer being overruled, (Rec., p. 7.) On appeal, the judgment overruling the demurrer was affirmed, (Rec., p. 8,) when the District replied also to the special plea, and the cause was tried by a jury, resulting in a verdict and judgment for the company. This judgment was also affirmed by the General Term of the Supreme Court of the District.

The case is here on writ of error, the questions involved, and which are relied on, being—

1. Whether the Legislative Assembly of the District had authority to reduce the amount annually payable by the company to the District, as required by the company's act of incorporation?

2. Whether the resolution of the Legislative Assembly of August 23d, 1871, reduced that amount, or the rate of payment, or in anywise modified the obligations of the company to the District?

3 Whether that resolution of the Legislative Assembly was properly admitted in evidence?

4. Whether the company could, by reason either of anything contained in its act of incorporation, or of the act of Congress of March 3d, 1873, make the agreement with or the conveyance to the District of March 18, 1873?

5. Whether the Governor and Board of Public Works of the District could, either by reason of the act of Congress of March 3d, 1873, or otherwise, make with the company

the agreement of March 18, 1873, or take from the company for the District the conveyance of that date?

6. Whether the evidence at the trial sustained the averments of the company's special plea?

Of these questions the first, second, fourth, and fifth are raised by the demurrer to the special plea, by the court's instruction to the jury at the trial, and by the court's refusal to instruct the jury at the trial as prayed by the District; the third is raised by the admission in evidence of the resolution in question, against the objection of the District; and the sixth is raised by the court's instruction to the jury at the trial.

II.

ASSIGNMENTS OF ERROR.

1. The court erred in overruling the plaintiff's demurrer.

2. The court erred in refusing to instruct the jury as prayed by the plaintiff, viz: "That the plaintiff is entitled to recover from the defendant the sum of $25,000 *per annum* from the first day of January, 1871, when the company took possession, down to the 1st day of April, 1873."

3. The court erred in admitting in evidence the resolution of the Legislative Assembly of the District of Columbia of August 23, 1871.

4. The court erred in instructing the jury that "this case had been taken to the General Term upon demurrer to the special plea; that the General Term had overruled the demurrer, and as defendant had produced testimony under every part of the special plea, and the plaintiff had produced none whatever in rebuttal, the duty of the jury was to find a verdict for the defendant."

III.

ARGUMENT.

A.

The sixth question above stated demands little attention. The instruction by the court, out of which it grows, involves the declaration that the defendant's special plea had been proved in all its particulars.

1. One of the averments of the plea is that the land authorized by the act of March 3, 1873, to be secured "was a portion of the land granted to the defendant company by said act of May 20, 1870, in consideration of which said sum of $25,000 was to be paid annually to said city of Washington."

Not only is it not true that the $25,000 were to be paid in consideration for the land, but also the averment is utterly unsupported by proof. It does not appear by the record that the land to be secured was a portion of the land granted the company; or, to speak correctly, the use of which was granted the company.

2. Another averment of the plea assumes a modification by the Legislative Assembly of the obligations imposed on the company by its act of incorporation. No such modification was proved. The resolution of the Assembly relied on in support of this averment is examined below, (*post*, p. 11.)

3. A third averment of the plea is that the District, represented by the Governor and Board of Public Works, made with the company the agreement of March 18, 1873. The District was not party to that agreement, nor was it named as such. The Governor and Board could make no such agreement for the District; and they could not and did not represent the District for such purpose.

This question is considered below, (*post*, p. 18.)

B.

The first, second, and third questions may be considered together.

1. *Had the Legislative Assembly of the District, on August 23, 1871, authority to modify or in anywise to affect the annual amount payable by the company, or its obligations to the District, as fixed by the act of incorporation?*

The land of which the company was granted the use was land of the United States. The conditions affixed to the use came, as they only could come, from the United States. In the absence of express authority to that effect, how could the District of Columbia, or its Legislative Assembly, any more than the merest outsider, alter or affect those conditions?

One of the conditions of the company's use is the annual payment by it to the District of a specified sum, not for the District's own use, but for a charitable purpose, and in the direction of lightening the burdens of the citizens of the District.

The contracting parties being Congress on the one hand and the company on the other, in what relation to them stands the District? Not even as beneficiary, but only as the trustee or almoner of Congressional benefaction, the means of which benefaction the company is bound to supply. Thus being the recipient of the $25,000 in a purely fiduciary capacity, could the District or its Assembly reduce or in anywise affect the amount, Congress, the donor of the gift, not concurring?

If ever Congress was party to any modification of the company's obligations, it certainly was not, and is not claimed to have been, such party in August, 1871. At that time there was wholly wanting any action by Congress from which by any ingenuity could be extracted authority to make a reduction in the amount payable. The reduction was made, if at all, by the mere resolution of the Assembly.

No authority for such pretended action by the Assembly

is to be found in the record, and none such was ever conferred on the Assembly. The provisions of the organic act are unequivocally to the contrary:

"SEC. 16. * * * The District shall never pay, *assume*, or become responsible for the debts or liabilities of, or in any manner give, loan, or extend its credit to or in aid of any public or other corporation, association, or individual.

"SEC. 17. * * * The Legislative Assembly shall have no power to *release* or *extinguish*, in whole or *in part*, the indebtedness, liability, or *obligation of any corporation* or individual to the District, or to any municipal corporation therein. * * *

"SEC. 18. The legislative power of the District shall extend to all rightful subjects of legislation within said District, *consistent with* the Constitution of the United States and *the provisions of this act.*" (16 Stats., 423.)

These emphatic declarations, laying the most positive prohibitions on the District and its Legislative Assembly, were the law of that body on August 23, 1871; and nothing in the organic law, or in any other act of Congress, detracted one jot from their vigor.

The question under consideration must be answered in the negative.

2. *Conceding to the Legislative Assembly the right contended for, did the Assembly, by its resolution of August* 23, 1871, *in anywise reduce, alter, modify, or affect the amount payable by the company, or its obligations to the District?*

The answer to this question is found in the language itself of the resolution; in order to a clear understanding of which the joint resolution of Congress of December 20, 1870, (16 Stats., 589,) is necessary. That resolution is as follows:

JOINT RESOLUTION relative to the Centre Market in Washington.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the chairmen of the Committees on Public Buildings and Grounds of the Senate and House of Representatives, *with*

the Mayor of Washington, be, and hereby are, constituted commissioners *to require* the Washington Market Company, organized under the fifteenth section of the act of May twentieth, eighteen hundred and seventy, promptly to furnish temporary market accommodations for the marketmen who were driven out by the late fire; and also to erect at the earliest possible day the first stories or market portions of the permanent market-buildings provided for in said act; and that said commissioners be authorized to make such alterations in the buildings and such arrangements with said company as shall be best calculated *to secure the speedy erection* of buildings creditable to the city, and sufficiently commodious for all the wants of the public: *Provided, however*, That the passage of this resolution shall not be construed to supersede, delay, or in any way affect the pending investigations into the affairs of said company, nor to relieve the company or any person from consequences of any acts under investigation.

This was adopted in December, 1870. Two months later, at the same session, Congress, by act of February 21, 1871, abolished the Mayor of Washington, (16 Stats., 428;) whereupon the Legislative Assembly, created by the same act, adopted the resolution in question, (Rec., pp. 15, 16,) as follows:

A RESOLUTION in relation to the Washington Market Company.

Be it resolved by the Legislative Assembly of the District of Columbia, That the Governor be authorized and required to act as one of the commissioners of the Washington Market Company, under the resolution of Congress approved December twenty, eighteen hundred and seventy; and that he be requested to procure such alterations in the plan of the buildings to be erected by said company as shall transfer the proposed hall from the Ninth street wing to the main building on Pennsylvania avenue, *and also to secure a reduction from twenty-five thousand dollars to twenty thousand dollars* of the annual rental required to be paid by said company, and which is now assessed by the company upon the stallholders.

(Stats. Dist., part 2, p. 169.)

The object and effect of the resolution seem too plain for

argument: it was intended merely to substitute the Governor of the District for the defunct mayor, as one of the commissioners provided for by Congress; and attending the substitution was a request to the substitute to procure a certain thing and to secure the reduction mentioned. That is all: the person named was to do something in the future; yet it is seriously contended that *ipso facto* the resolution wrought that something.

And the matter is at its worst, from the fact that neither the Governor nor the other commissioners did anything whatever in the way of securing the reduction that either Congress or the Legislative Assembly (had it the power) might adopt or approve.

This resolution, then, neither operated, nor even purported to operate, a reduction; nor did it fix a rate, or otherwise modify the company's obligations. And with the claim that it did either falls any claim that might be set up by reason of reference to the resolution in the memorandum of March 18, 1873. (Rec., p. 12.)

3. *Was, then, the resolution of August 23d, 1871, properly admitted in evidence at the trial?*

Clearly not. Any resolution of August 23d, 1871, admissible under the pleadings would be one modifying the obligations imposed on the company by section 14 of its act of incorporation. Such was not, as just shown, the resolution admitted.

C.

We come now to the heart of the controversy, the fourth and fifth questions above-stated, involving the respective powers of the company and the District, or rather its Governor and Board of Public Works, in connection with the transaction of March 18, 1873.

Could the company, by reason either of anything contained in its act of incorporation or of the act of Congress of March 3d,

1873, *make with the District, or with the Governor and Board of Public Works, the agreement and conveyance of March* 18, 1873?

The powers and privileges conferred on the company by the act of incorporation, and material to the argument, are the following:

(1) To be a body corporate, (sec. 1;)

(2) To locate and construct a suitable building or buildings upon certain described grounds, (part of which is the ground attempted to be conveyed to the District,) and to use and occupy the same by the erection of such suitable building or buildings, part of which to remain and always be used only for a designated purpose, (sec. 2;) and

(3) To enjoy the privileges conferred for a term of ninety-nine years, or until forfeiture, (sec. 12.)

These powers and privileges are subject by the act to the following conditions and limitations:

(1) The company to adopt the plans and specifications annexed to the act, (sec. 5;)

(2) The company, within a reasonable time, to purchase and pay for all buildings and fixtures then on the ground belonging to individuals, in a specified manner, the same to be removed, (sec. 10;)

(3) Work on the new buildings to be commenced within sixty days from the company's taking possession, and to be fully completed within two years from commencement, on pain of forfeiture, (sec. 11;)

(4) On failure to comply with any of the conditions of the act, for the space of six consecutive months, the company to forfeit its franchise, (*ibid.*;)

(5) Upon a desire to that effect by the Corporation of the city of Washington, after a period of thirty years from the passage of the act, Congress may authorize the corporate

authorities to take the buildings, &c., on payment to the company of a fair valuation, (sec. 12;)

(6) The real estate to be vested in the company during the term of ninety-nine years, or until forfeiture by breach of conditions, the said estate to be "taken and considered as a determinable fee;" and the company's real and personal property to be "subject to assessment and taxation for all District and municipal purposes in the same manner and to the same extent that like property in the city of Washington, owned and possessed by individuals, is liable to assessment and taxation," (sec. 13;)

(7) In consideration of the privileges granted by the act, the company to pay, yearly, every year during the said term of ninety-nine years, unto the city of Washington, the sum of twenty-five thousand dollars; the said sum to be received by said city, and set apart and expended by and under the direction of the city government of said city, for the support and relief of the poor of said city and of the District of Columbia; and the city to have power to enforce the payment of said sum, from time to time, as the same shall become due, either by an action at law or by the same proceedings authorized by law for the collection of taxes by said city, (sec. 14;) and

(8) The right being reserved to Congress to legislate in respect to the property granted, and to amend or repeal the act, (sec. 17.)

To ascertain the company's powers in the premises, the fundamental inquiry is, What is the nature of the company's estate in the land granted it?

It is "authorized and empowered to locate and construct a suitable building or buildings" on the land, "and to use and occupy the same" for a specific purpose; the term of occupation being ninety-nine years, or until forfeiture by breach of conditions; and the estate to be "taken and considered as *a determinable fee.*"

Thus any but the designated use of the land, or any in-

consistent action by the company concerning it, is doubly guarded against: first, by a restriction on its use, and secondly, by imposing on the estate the conditions of a determinable fee.

A determinable fee, otherwise called a base or qualified fee, is such as has a qualification annexed to it, and which must be determined whenever that qualification is at an end.

2 Bl. Comm., 109.
Cruise Dig., tit. 1, secs. 72 *et seq.*

Every such estate depends upon the duration of its qualification. The qualification in this case is the observance by the company of the conditions imposed by the act of incorporation; but the estate to be determined is not a fee, only a term of years.

Bearing in mind that at best acts of incorporation and those conferring special privileges are to be construed strictly, (Moran *vs.* Comm'rs, 2 Bl., 722,) we have here, then, an estate for years liable to be determined by default of the grantee, and that estate conferred for a specific purpose; the use and occupation of the land by the erection of buildings of a given description, plans, character, and purpose. Does such an estate carry with it the power of alienating the land or any portion thereof?

There is a restriction on the use imposed by the grantor, whose power to impose it is not open to question; and the restriction is not inconsistent with the estate or the object of its creation. The estate may be thoroughly enjoyed within the restriction, and it must be so enjoyed or lost. To convey away any part of the land would be to put it to a use other than that limited, and would be *pro tanto* to defeat the object, as to conflict with the condition, of the grant.

All this, however, has reference only to the company's powers under its act of incorporation, which is not relied on; but so much is necessary in order to a correct examination of that which is relied on—the act of Congress of

March 3d, 1873. Understanding the limitations on the company's powers as determined by the act of incorporation, we are in a position intelligently to consider the question how far, if at all, the later act qualified or removed those limitations.

The paragraph from the act of March 3, 1873, relied on is as follows:

From "An act making appropriations to supply deficiencies," &c., approved March 3, 1873.

* * * * * * *

"For the purchase by the United States of the interest of the District of Columbia in the present City Hall building in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and *no land, or the use thereof, is hereby granted* for the purpose of erecting any building thereon, for such building." (17 Stats., 540.)

As is seen, this paragraph makes no mention whatever of the Market Company, or of its land, or of its act of incorporation, or of anything having the remotest reference to any one of those subjects. How, then, it may be asked, can the company claim any enlargement of its powers or diminution of its limitations and restrictions, based on such an act? And answer is confidently made: Through the authority granted the Governor and Board of Public Works by the act. This is the company's contention: The Governor and Board were given certain authority; in exercising that authority they saw fit to deal with us; but so to

deal was to run counter to certain provisions of our act of incorporation; therefore, those provisions were *ipso facto* annulled and set at naught.

This contention brings us to our last inquiry:

Could the Governor and Board of Public Works of the District, by reason either of their ordinary powers or of the act of Congress of March 3, 1873, *make with the company the agreement of March* 18, 1873, *or take from the company for the District the conveyance of that date?*

The powers of the Governor and Board under the organic act are very simply and clearly defined.

The Governor's powers are merely executive, (sec. 2.) The powers of the Board are given by sec. 37, being: To have entire control of and to make all regulations which they might deem necessary for keeping in repair, the streets, avenues, alleys, and sewers of the city, and all other works which might "be intrusted to their care by the Legislative Assembly or Congress;" and to "make all necessary regulations respecting the construction of *private* buildings in the District of Columbia, subject to the supervision of Congress."

And it will hardly be questioned that these powers are subject to limitation by the prohibitions above noted, (*ante*, p. 11.)

The transaction of March 18, 1873, transcends the powers of the Governor and Board under the organic act. Here is what that transaction amounts to, and what it involves, (Rec., pp. 11–13.)

(1.) The company is to release and convey to the District all the former's title and interest to a certain portion of the land described in its act of incorporation; and, also, a certain right in common.

This is in excess of the powers granted the company by its act. As above contended, (*ante*, p. 16,) such right to

to release and convey cannot be found among the powers and privileges conferred on the company, either explicitly or by necessary implication. On the contrary, it is excluded by the enumeration of the conditions and limitations of those powers and privileges, among them being the restriction on the use and the determinable character of the estate. And the *habendum* of the company's deed to the District is as of a fee simple, (Rec., p. 14;) notwithstanding the reversion in the United States specifically provided for by the act of incorporation, (sec. 12.)

(2.) The District is to "*assume and fulfill all obligations imposed upon the company* by section 14" of the act of incorporation, with certain exceptions.

This in terms contravenes the provisions of the organic act forbidding such assumption of obligations; and it is attempted to be done, not by the government of the District, but by the Governor and Board of Public Works, of whom only the former was a constituent part of that government for general purposes.

And it is important to notice that when the then government of the District came into existence, (June 1, 1871,) the company was a corporation of more than a year's standing, with just such obligations to the District as those against the assumption of which by the latter the prohibition runs.

(3.) The company's annual payment to the District, provided for by section 14 of the act of incorporation, is to be reduced to $7,500.

This is an attempt by the Governor and Board to do what even the chief constituent part of the District government—the Legislative Assembly—is distinctly prohibited to do, viz., to release or extinguish in part the liability or obligation of a corporation to the District, as successor to a municipal corporation therein.

(4.) If in any year the general District taxes on the company's property exceed $5,500, the excess above that amount

is to be deducted from the said sum of $7,500, so that in no event may the total annual payments by the company to the District for rental and taxes exceed $13,000.

This is obnoxious to the same objection as the last-mentioned provision; and further, it also contravenes the provision of section 14 of the act of incorporation, that "the real and personal property of said corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation."

If the Governor and Board, neither chosen by the people, could do such a thing, they could as well abolish altogether the payment by the company, and forever exempt its property from all taxation.

(5.) While the right, conferred by section 2 of the company's act, is reserved to the District of fixing and controlling the amount of rental of the market stalls and stands, the District is to be bound to a *minimum* rate.

This is an abdication *pro tanto* of the right in question, and an attempt to bind all future administrations of the District government to that abdication. The Governor and Board could as well have deprived the District of the right altogether and for all time.

(6.) The District is not to use for market purposes the land released and conveyed.

This attempts to bind the District to accept property with a restriction on its use.

(7.) Finally, the company is to settle its past account "at the rate since August 23d, 1871, fixed by the resolution of the Legislative Assembly of that date."

This assumes that the Assembly had adopted a resolution fixing a rate different from that fixed by Congress; and if such resolution had been adopted, being of no effect as

above contended (*ante*, p. 10), it could no more be vitalized by the Governor and the Board than could the reduction to $7,500 be made by them.

We have, then, the conveyance to the District with all the prescribed conditions attaching to it as though they were set out at large in the body of the instrument. Knowing the limitations on the respective powers of the company making the conveyance, and of the Governor and Board of Public works accepting it as for the District, we look to the act of Congress of March 3d, 1873, for reconciliation of all conflicts.

At the risk of repetition, the vital portion of that act may be restated. It is as follows:

"The Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; *and no land, or the use thereof*, is hereby granted for the purpose of erecting any building thereon, for such building."

What are the object and effect of this? The whole argument at this point lies in the mere statement of what was done and what is claimed.

Provision has just been made to extinguish the District's interest in the only public building it has—the City Hall; an appropriation of the amount due the District for that interest has just been made; and now the Governor and Board of Public Works are authorized "to make arrangements" to secure for another public building for the District sufficient land fronting on Pennsylvania and Louisiana avenues, in the city of Washington.

But beneath the innocent surface of these few words is

is to be deducted from the said sum of $7,500, so that in no event may the total annual payments by the company to the District for rental and taxes exceed $13,000.

This is obnoxious to the same objection as the last-mentioned provision; and further, it also contravenes the provision of section 14 of the act of incorporation, that "the real and personal property of said corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation."

If the Governor and Board, neither chosen by the people, could do such a thing, they could as well abolish altogether the payment by the company, and forever exempt its property from all taxation.

(5.) While the right, conferred by section 2 of the company's act, is reserved to the District of fixing and controlling the amount of rental of the market stalls and stands, the District is to be bound to a *minimum* rate.

This is an abdication *pro tanto* of the right in question, and an attempt to bind all future administrations of the District government to that abdication. The Governor and Board could as well have deprived the District of the right altogether and for all time.

(6.) The District is not to use for market purposes the land released and conveyed.

This attempts to bind the District to accept property with a restriction on its use.

(7.) Finally, the company is to settle its past account "at the rate since August 23d, 1871, fixed by the resolution of the Legislative Assembly of that date."

This assumes that the Assembly had adopted a resolution fixing a rate different from that fixed by Congress; and if such resolution had been adopted, being of no effect as

above contended (*ante*, p. 10), it could no more be vitalized by the Governor and the Board than could the reduction to $7,500 be made by them.

We have, then, the conveyance to the District with all the prescribed conditions attaching to it as though they were set out at large in the body of the instrument. Knowing the limitations on the respective powers of the company making the conveyance, and of the Governor and Board of Public works accepting it as for the District, we look to the act of Congress of March 3d, 1873, for reconciliation of all conflicts.

At the risk of repetition, the vital portion of that act may be restated. It is as follows:

"The Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; *and no land, or the use thereof*, is hereby granted for the purpose of erecting any building thereon, for such building."

What are the object and effect of this? The whole argument at this point lies in the mere statement of what was done and what is claimed.

Provision has just been made to extinguish the District's interest in the only public building it has—the City Hall; an appropriation of the amount due the District for that interest has just been made; and now the Governor and Board of Public Works are authorized "to make arrangements" to secure for another public building for the District sufficient land fronting on Pennsylvania and Louisiana avenues, in the city of Washington.

But beneath the innocent surface of these few words is

said to lie concealed a wondrous talisman of power and privilege—a very Aladdin's lamp. And what that power is claimed to be is best seen in recalling its purported exercise.

A corporation, the creature of Congress, though not even named, is endowed with new and enlarged powers; though still unmentioned, its charter is amended and in part repealed, but always the amendment is in the direction of increased privilege, the repeal in the direction of curtailed limitations; the organic law of the nation's capital is annulled and set aside, its government subjected to unneeded restrictions and conditions and the sacrifice of rights; in defiance of that organic law, obligations and liabilities already accrued are released and extinguished; and, without the sound of a voice on behalf of those concerned, taxation is increased, no law providing it.

"The Governor and Board of Public Works are authorized" to make a bargain; this carries with it everything necessary to what the Governor and the Board may deem advisable in the premises: the crushing to powder all restrictions on themselves—the removing all limitations and disqualifications of the bargainee of their nomination. Why say that the organic law is in the way? they have touched it, and it is gone. Why speak of the disqualifications of the bargainee? they have vanished at a breath. Is the land selected vested in an infant or a lunatic? the one becomes of age, the other sound of mind. The ultimate rights of the District's citizens may count for naught; on their shoulders is again laid the full weight of the poor's support, and taxes are readjusted to the increase of their burdens and in aid of the corporation already vastly privileged. But who may complain? Has not Congress, in the gasp of death, said that the Governor and the Board may "make arrangements?" and does not that make all conditions easy and all burdens light?

In conclusion, the judgment below should be reversed, for—

1. The company did not prove the averments of its special plea;

2. The Legislative Assembly of the District could not, and did not, change the rate of the company's payment to the District; and the company's claim that its obligations have been met rests on the contrary assumption; and

3. The company is not relieved by the agreement of March 18, 1873, because neither the company nor the Governor and Board of Public Works could lawfully make that agreement.

HENRY E. DAVIS,
For Plaintiff in Error.

108-243

OFFICE SUPREME COURT U.S.
FILED
MAR 12 1883
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 193.

THE DISTRICT OF COLUMBIA

vs.

THE WASHINGTON MARKET COMPANY.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF THE PLAINTIFF IN ERROR.

A. G. RIDDLE,
For Plaintiff.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 193.

THE DISTRICT OF COLUMBIA

vs.

THE WASHINGTON MARKET COMPANY.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF THE PLAINTIFF IN ERROR.

THE CASE MADE BY THE PLEADINGS.

The declaration consists of three counts.

First count sets out the parties and their relations.

By the fourteenth section of the act of May 20, 1870, the defendant became obligated to pay the plaintiff the sum of $25,000 per annum, for ninety-nine years, in consideration of the franchises granted to it, commencing from January 1, 1871, made payable to the Corporation of Washington. Said Corporation ceased on the first day of June following; at which time there remained a balance due of $173.20, for which suit was brought.

Second count.—That from June 1, 1871, to November 1, 1875, by reason of the premises, there became due to the plaintiff the sum of $110,416.66, of which there remained unpaid the sum of $53,847.23.

Third count.—For money had and received by the defendant for the plaintiff—money found due—to wit, $53,847.23, for which the plaintiff sues, and for interest on the various yearly sums from the time when due.

To the declaration is appended a bill of particulars, debt, and credit, as follows:

COMPTROLLER'S OFFICE, D. C., *November* 3, 1875.

WASHINGTON MARKET COMPANY *in account current with* THE DISTRICT OF COLUMBIA.

		Debit.	Credit.
On account late Corporation of Washington:			
To franchise rental under charter from January 1, 1871, to May 31, 1871, at the rate of $25,000 per annum		$10,416 67	
1871—By cash February 7	$2,000 00		
March 6	2,002 35		
March 14	3,000 00		
May 17	2,500 00		
			$9,502 35
Licenses refunded under authority of an act of the City Council			741 12
Balance due late Corporation of Washington			173 20
		$10,416 67	$10,416 67
On account District of Columbia:			
Balance due late Corp'n Wash'n, am't bro't forw'd		$173 20	
To franchise rental under charter from June 1, 1871, to Nov'r 1, 1875, at the rate of $25,000 per annum (a period of 4 years and 5 months)		110,416 66	
1871—By cash December 23			$5,206 32
1872—By cash February 3			2,000 00
February 26			2,500 00
February 27			2,500 00
May 7			1,500 00
May 8			1,204 00
August 21			8,971 41
November 16			2,000 00
November 27			1,000 00
1873—By cash February 8			3,000 00
March 7			3,000 00
March 29			3,597 21
July 8			1,875 00
October 1			1,875 00
December 4			500 00
Hay-scales, Decemb'r 31, sold, not delivered			1,506 25
1874—By cash January 3			1,375 00
April 1			1,875 00
June 15			500 00
July 9			1,382 44
October 20			1,875 00
December 28			1,875 00
1875—By cash March 9			1,875 00
June 30			1,875 00
October 1			1,875 00
Balance November 1, 1875			53,847 23
		$110,589 86	$110,589 86
To balance due District of Columbia, Nov. 2, 1875		$53,847 23	

Filed November 23, 1875.

PLEAS.

First. The general issue.

Second. A special plea.

Which sets up that on the 3d of March, 1873, Congress passed an act appropriating $75,000 for the purchase of the City-hall, and authorizing the District to use it in the erection of a Government building, for which purpose it was authorized to make an arrangement to secure land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, a portion of the land granted to the defendant by the act of May 20, 1870, for which said sum of $25,000 was to be paid annually.

That afterward, on the 18th of said March, an agreement was made between the parties, pursuant to said act, by which the defendant would convey to the plaintiff, for the erection of a building, said land, extending from Seventh to Ninth street, and 86 feet deep; also the use of a passage-way and court-yard, between said land and a line ten feet north of the defendants' market-house.

In consideration of which conveyance the plaintiff would assume the obligations imposed on defendant by section 14 of the act of May 20, 1870, as modified by act of the Legislative Assembly of August 23, 1871, and the defendant should pay the plaintiff the sum of $7,500 each year, quarterly, as full rental for the ground occupied by the defendant. And that, in case it should so happen that the general taxes assessed on said property of the defendant for any year, should exceed $5,500, the excess above that amount should be deducted from said rental of $7,500, so that the total of rent and taxes should never exceed the sum of $13,500 for any one year. Said agreement to take effect April 1, 1873.

The conveyance of the land was made, and the plaintiff took possession of the same.

Said sum of $75,000 was paid to the plaintiff by the United States, and on the 26th of June, 1873, the District Legislature appropriated $15,000 in addition, and placed the same at the disposal of the Board of Public Works, to erect said

building on said land. Said company erected its said market-house on the rear portion of said land granted to it, and said front was valuable to it for the erection of the buildings as provided for in its charter.

Upon the conclusion of said agreement the defendant settled its first rental account, and paid all amounts due to said date, and it has since paid the same at the rate of $7,500, as by said agreement bound.

And the plaintiff ought not to be permitted to say as it hath declared.

THE PLAINTIFF DEMURRED

to the special plea, and specifically mentions the several questions for argument:

1. The act of the District Legislature does not reduce the amount to be paid.

2. The Legislature had no power to reduce the amount.

3. The defendant had no power to convey the land to the District.

4. The District had no power to acquire the same.

On argument, the circuit court overruled the demurrer, which was affirmed in the general term. (Rec. pp. 8–9.)

Thereupon issue was joined on the pleas, and on trial testimony was given and offered by the plaintiff; also testimony was given by the defendant, and exceptions taken by the plaintiff to the ruling by the court on the admission of evidence. The court overruled the plaintiff's prayer for instruction to the jury, and instructed them that the plaintiff could not maintain the action for any part of its said claim; to all of which the plaintiff excepted. (Rec. p. 17.)

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the plaintiff's demurrer.

2. The court erred in rejecting the plaintiff's prayer for instruction to the jury.

3. The court erred in its instruction to the jury to return a verdict for the defendant.

MATERIAL.

It is deemed advisable to here insert the act of incorporation of the defendant at length, as also other acts of Congress and of the District Legislature, indentures, papers and other material used in the trial, and important in the argument and consideration of the case.

A.

CHAP. CVIII.—*An Act to Incorporate the Washington Market Company.* (16 Statutes, 124.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Thomas Berry, D. W. Bliss, Henry D. Cooke, William B. Todd, Peter Gardner, Henry S. Davis, George W. Riggs, Byron G. Daniels, M. G. Emery, Frederick P. Stanton, Thomas C. Connolly, S. P. Brown, John S. Crocker, Alexander R. Shepherd, William Clark, Hallett Kilbourn, John R. Elvans, B. F. French, C. H. Michner, James L. Barbour, I. T. Mitchell, T. T. Fowler, T. H. Alexander, J. W. Angus, W. W. Rapley, and Thomas Lewis, their successors, and each of their assigns, be, and they are hereby, created a body corporate and politic, by the name and style of the Washington Market Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, to plead and be impleaded, to defend and be defended, in all courts of law and equity; and may make and use a common seal, ordain and establish such by-laws, ordinances, and regulations not inconsistent with this act or of the laws of the United States, as may be necessary and proper for the management of the concerns of said company. Said company shall have power to issue and sell bonds, or to borrow money and execute mortgages and deeds of trust upon its property and franchise.

SEC. 2. *And be it further enacted*, That said company is hereby authorized and empowered to locate and construct a suitable building or buildings upon the following described

grounds, namely, commencing at the intersection of the center line of B street north with the west line of Seventh street west, running thence north along the west side of Seventh street to the southerly side of Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street west; thence along the east line of Ninth street to the centre line of B street; thence along the centre line of B street to the place of beginning; and to use and occupy the same by the erection of a suitable building or buildings for a public market-house, including the necessary stalls and sheds, and also for stores, public halls, and such other purposes as may be determined by said company, not inconsistent with its use as a public market. The buildings herein designated to be used for the purposes of a market shall be used for no other purpose inconsistent therewith, but the same shall remain a public market as hereinbefore described. And the said company shall, whenever any part or parts of said buildings, stalls, stands, and so forth, for market purposes, are ready for use or occupancy, offer the same for sale at public auction for one or more years, to the highest bidder or bidders, subject to the payment of an annual rent, the amount of which to be fixed by the mayor and common council of the city of Washington and the directors of this incorporation, and public notice shall be given of the day of said sale in two or more daily newspapers published in the city of Washington, for two weeks previous to said sale, and by hand-bills to be posted up in said market grounds ten days previous thereto; and all subsequent sales and leases thereof shall be made on similar notice and in the same manner; and the said company shall have full power to assess and collect rents for the use of said buildings, stands, stalls, and grounds aforesaid. The stalls, stands, and privileges of all kinds in said market to be used for market purposes, when offered at public sale, shall be let to the highest bidder, and there shall be no bidding on the part of said company, directly or indirectly; but said company, with the consent of the mayor and aldermen of the city of Washington, may fix a minimum rate of bids at such sale; and the person who shall offer the highest price at or beyond such minimum for any such stand, stall, or privilege, shall be entitled to the occupation thereof, and shall be considered as having the good-will and the right to retain the possession thereof so long as he chooses to

occupy the same for his own business and pay the rent therefor; and the rent shall only be raised on application to the mayor and common council, who, after hearing the parties, may change and determine the same: *Provided, however*, That such right to the possession of such stands or stalls may be sold and transferred by such purchaser, under regulations to be fixed by the by-laws of said company, and in the case of the death of any such purchaser during the existence of his lease, it shall be disposed of as other personal property; and the municipal government of said city shall at all times have power to make and enforce such regulations with regard to said market and the management thereof as in their judgment the convenience, health, and safety of the community may require.

SEC. 3. *And be it further enacted*, That the capital stock of said company shall be one million of dollars, and shall consist of twenty thousand shares of fifty dollars each. The stock may be subscribed for upon the books of the company, which shall be opened at the Department of the Interior, in the city of Washington, on the second Monday following the final passage of this act, at twelve o'clock, noon; said books to be kept open until the whole amount of said stock shall be subscribed, or so much thereof, not less than fifty per centum of the whole amount, as a majority of said corporators shall deem sufficient to authorize the said company to commence work. A cash payment of ten per centum shall be paid at the time of subscription to said stock to the person or persons authorized to receive the same by the said corporators. After the books, as aforesaid, shall have been kept open for the space of two days, if a larger amount than the capital stock of said company shall have been subscribed, the books shall be closed, and the said corporators shall forthwith apportion said capital stock among the subscribers in such manner that citizens of the city of Washington shall have the full amount individually subscribed for, so far as may be practicable; and any deductions necessary in consequence of any excess of subscription shall be made from subscriptions of the largest amount, so that no *bona fide* subscription shall be diminished while any larger subscription shall be maintained. That as soon as the stock is subscribed and apportioned as above mentioned, and the payment made as aforesaid, the said corporators, or a majority of them, shall call a meeting of the stockholders at some place in Washington city, District of Columbia, by advertisement in one or more of the daily newspapers

in said city ten days previous thereto, and the stockholders, in person or by proxy, shall proceed to the election from among the stockholders, by ballot, of thirteen directors for conducting and managing the business of said company for the term of one year from the time of their election, or until the first Monday of January next ensuing their election, if that should happen to be less than one year from the election; that said directors, when elected, shall immediately appoint one of their number to be president of the board of directors, and also appoint a treasurer of said company. In the absence of the president, a majority of said directors may appoint a president *pro tempore;* and a majority of said directors shall constitute a quorum for the transaction of business.

SEC. 4. *And be it further enacted*, That said directors may fill any vacancy which may happen in their own body during the time for which they are elected, and in case of the death, resignation, or disqualification of the president or treasurer, to fill the vacancy, to serve for the residue of the term; and the stockholders, on the first Monday of January in each and every year thereafter, shall elect by ballot, at the office of the said company, a new board of thirteen directors from among the stockholders, from whom a president and treasurer shall be appointed as above mentioned, to hold their offices for one year from the time of their election, and until their successors are elected and qualified. Each stockholder shall be entitled to one vote for every share of stock held by him or her at the time, which may be given by the stockholder, or by proxy, at any general or special election, of which general or special election notice shall be given by advertisements in one or more of the daily newspapers in said city ten days previous thereto.

SEC. 5. *And be it further enacted*, That the plans submitted by the incorporators, as set forth in the schedule annexed to this act, and which schedule is made part of this act, and as set forth in the drawings referred to in said schedule, shall be adopted for such new buildings and market square. There shall be one or more entrances to said market grounds between Seventh and Ninth streets, on Pennsylvania avenue or Louisiana avenue, of suitable width and height, for the accommodation of pedestrians.

SEC. 6. *And be it further enacted*, That the treasurer of said company shall, before he acts as such, give a bond to the company, in such penalty and with such security as the

president and directors shall require, conditional for the faithful discharge of the duties and trusts committed to him. All salaries shall be fixed by the president and directors.

SEC. 7. *And be it further enacted*, That the shares in said company shall be deemed personal and not real estate, and shall be transferable in such manner as the by-laws of the company shall prescribe; and the shares held by any individual shall be liable to be attached or taken in execution to satisfy the debts due from any such stockholder in like manner as other personal property may be.

SEC. 8. *And be it further enacted*, That the said president and directors of said company shall have power to demand and receive of the stockholders the remaining nine-tenths of said stock from time to time as they shall deem necessary: *Provided*, That such calls shall not exceed the rate of fifteen per centum thereof per month; and if any stockholder shall neglect or refuse to pay the amount due and demanded, within thirty days after said demand, the said shares may be forfeited, or not, by said directors at their option.

SEC. 9. *And be it further enacted*, That the said president and directors shall have power to contract with any person or persons for the necessary work on the grounds, and for the construction of buildings, stands, stalls, and all necessary fixtures; to appoint a general superintendent and other laborers, and to affix the amount of compensation for labor, as well as for all materials furnished said company, and to do all acts which by this act and the by-laws of said company they may be authorized to do.

SEC. 10. *And be it further enacted*, That the said company is hereby required to purchase and pay for all buildings and fixtures which may be upon the above-mentioned ground belonging to individuals, within a reasonable time after the passage of this act, the price of which shall be agreed upon by the president and directors of said company and the owners (should they demand any pay therefor) of the aforesaid buildings and fixtures; and whenever the president and directors and the owners of said property cannot agree as to the price of said buildings or fixtures, then in such case the company shall select one competent person, and the owner shall select one competent person, and they, the two, shall choose a third one, who shall proceed to value the buildings and fixtures, and a decision of a majority of the

three shall be final as to the value of said property, and the amount so agreed upon shall be paid to the owner thereof before the same is removed from the grounds aforesaid. That in case the owner of said property will neither sell said property nor choose an arbitrator, as aforesaid, to value said property, after ten days' notice so to do, then, in such case, the said company may proceed to remove the same to some place off said grounds without being liable to an action for damages.

SEC. 11. *And be it further enacted*, That the said company shall, within sixty days from the time it gets quiet and peaceable possession of the real estate mentioned in this act, commence work thereon, and so prosecute the same that buildings for stores, halls, market grounds, stands, stalls, and other purposes, and all market buildings, shall be fully completed within two years or less from the commencement thereof; or in case said company shall not commence said buildings within the time aforesaid, or, having commenced, shall fail to complete the same within the time aforesaid, or, having completed the same, shall permit the same to get out of repair or become dilapidated, and should the said company fail to comply with any of the conditions of this act for the space of six consecutive months, the franchise hereby granted to said company shall be forfeited, and the rights and privileges hereby granted shall revert to the United States.

SEC. 12. *And be it further enacted*, That the privileges conferred by this act shall be enjoyed by said company for the term of ninety-nine years, unless sooner terminated for a non-compliance or abuse of the conditions herein imposed upon said company, which may be done by suit in the name of the United States, to recover possession of said property. At the end of said period of ninety-nine years, the said lands, with all the erections and improvements thereon, shall revert to the United States, unless Congress shall by law extend the period of occupation thereof by said company: *Provided*, That if the corporation of the city of Washington shall, after a period of thirty years from the approval of this act, by a vote of the councils thereof express a desire to possess itself of the said market buildings and grounds, Congress may authorize the corporate authorities to take possession of the same upon payment to the said Market-House Company of a sum of money equal to a fair and just valuation of the buildings and improvements then standing on said grounds, and the mode and manner of

ascertaining such valuation shall be determined by Congress.

SEC. 13. *And be it further enacted*, That the real estate herein described is hereby vested in the said corporation for and during the said term of ninety-nine years, or until a forfeiture of its rights and privileges by a breach of the conditions herein imposed on said company, and said estate shall be taken and considered as a determinable fee. The real and personal property of said corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation.

SEC. 14. *And be it further enacted*, That in consideration of the privileges granted by this act to the Washington Market Company, the said company shall pay, yearly, every year during the said term of ninety-nine years, unto the city of Washington, the sum of twenty-five thousand dollars; which sum shall be received by said city, and set apart and expended by and under the direction of the city government of said city for the support and relief of the poor of said city and of the District of Columbia; and said city may enforce the payment of said sum from time to time as the same shall become due, either by an action at law or by the same proceedings now authorized by law for the collection of taxes by said city.

SEC. 15. *And be it further enacted*, That if the corporators named in this act, or a major part of them, shall refuse or neglect, for sixty days from and after the passage of this act, to accept the franchise hereby created, or if, having accepted the same, they shall have forfeited the same within two years from and after the passage of this act, then and in that case it shall and may be lawful for any citizens of the city of Washington, to the number of twenty or more, to associate themselves together by articles in writing subscribed by them, whereby they shall undertake and agree to accept the franchise conferred by this act and to perform all the conditions therein imposed; said articles shall be recorded in the office of the register for the city of Washington, and thereupon such associates shall become a body corporate and be invested with all the rights, privileges, and immunities conferred by this act upon the corporators named therein.

SEC. 16. *And be it further enacted*, That the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation

may prescribe, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets as a market for the purchase and sale of the following articles, to wit: Hay, straw, oats, corn, corn-meal, seed of all kinds, wood for sale from the wagon, cattle on the hoof, swine on the hoof, country produce sold in quantities from the wagon, and such other bulky and coarse articles as the said corporation may designate. And from and after sixty days from the passage of this act marketing of the products named herein shall be excluded from Pennsylvania and Louisiana avenues and the sidewalks and pavements thereon.

SEC. 17. *And be it further enacted*, That all acts and parts of acts of the board of aldermen and board of common council and of Congress, inconsistent with this act, are hereby repealed, and that this act shall be deemed a public act, and shall take effect from and after its passage. But Congress hereby reserves the right to legislate in respect to said property hereby granted, and to amend or repeal this act.

Approved, May 20, 1870.

B.

As showing the origin and organization of the defendant's company, I quote the following paragraphs from its memorial to Congress of June 16, 1875:

"The corporation first organized under the act failed to commence the erection of market buildings within sixty days from the time of obtaining possession of the grounds, and consequently forfeited its rights under the act. This failure was occasioned by the sudden death of the principal subscriber for one-half the stock of the company, and *by complications growing out of an alleged engagement on the part of the grantees in the original act to give away, for asserted services in procuring the charter from Congress, one-half of the one million of capital stock provided for by the act.*

"By section 15 of the act it was provided that in case of a failure or forfeiture on the part of the original corporators, any citizens of Washington, to the number of twenty or more, might form an association, accepting the franchise and agreeing to perform the conditions of the act, and should, thereupon, become a corporation invested with all the rights, privileges, and immunities conferred upon the original corporators.

"Under this section 15 the present Washington Market Company was duly organized, the capital stock subscribed for, the cash instalment duly paid in, and the new corporation started free from any complications or embarrassments growing out of any engagements to donate stock for alleged services in procuring legislation. *To the refusal of the undersigned to fulfil any claims on account of those engagements they attribute many annoyances to which the enterprise has been subjected.*"

The buildings referred to, as occupying the ground in the foregoing act, were burned on the 20th of December, 1870, and Congress passed the following joint resolution, which the defendant claims must be taken as extending the time for the performance of its undertakings imposed by the act of incorporation:

C.

JOINT RESOLUTION relative to the Centre Market in Washington.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the chairmen of the Committees on Public Buildings and Grounds of the Senate and House of Representatives, with the mayor of Washington, be, and hereby are, constituted commissioners to require the Washington Market Company, organized under the fifteenth section of the act of May twentieth, eighteen hundred and seventy, promptly to furnish temporary market accommodations for the marketmen who were driven out by the late fire; and also to erect at the earliest possible day the first stories or market portions of the permanent market-buildings provided for in said act; and that said commissioners be authorized to make such alterations in the buildings and such arrangements with said company as shall be best calculated to secure the speedy erection of buildings creditable to the city, and sufficiently commodious for all the wants of the public: *Provided, however*, That the passage of this resolution shall not be construed to supersede, delay, or in any way affect the pending investigations into the affairs of said company, nor to relieve the company or any person from consequences of any acts under investigation.

Approved December 20, 1870.

16 Stats., 589.

D.

The following is quoted from the defendant's special plea:

"Said District of Columbia, in consideration of the aforesaid release and conveyance by said defendant company, agreed with said company that said District would assume and fulfil all obligations imposed upon said company by section fourteen of said act of May 20, 1870, *as modified by an act of the Legislative Assembly of the District of August* 23, 1871."

The following is the act referred to, as working the legal miracle so confidently pleaded:

[No. 11.] A RESOLUTION in relation to the Washington Market Company.

Be it resolved by the Legislative Assembly of the District of Columbia, That the Governor be authorized and required to act as one of the Commissioners of the Washington Market Company, under the resolution of Congress approved December twenty, eighteen hundred and seventy; and that he be requested to procure such alterations in the plan of the buildings to be erected by said company as shall transfer the proposed hall from the Ninth-street wing to the main building on Pennsylvania avenue, *and also to secure a reduction from twenty-five thousand dollars to twenty thousand dollars* of the annual rental required to be paid by said company, and which is now assessed by the company upon the stall-holders.

Approved August 23, 1871.

Stats. Dist., part 2, p. 169.

E.

The following is the paragraph of the act of Congress relied upon as authorizing the transaction set forth in the defendant's special plea:

From "An act making appropriations to supply deficiencies," &c., approved March 3, 1873.

* * * * * * *

"For the purchase by the United States of the interest of the District of Columbia in the present City Hall build-

ing in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon, for such building."

17 Stats., 540.

F.

AN ACT making an appropriation to defray the ordinary and contingent expenses of the several departments of the government of the District of Columbia, and prescribing the limits thereof, and fixing penalties for their violation.

* * * * * *

For the erection of a suitable building for the District offices, under the direction of the Governor and Board of Public Works, ninety thousand dollars: *Provided*, That seventy-five thousand dollars of this amount shall be drawn from the United States Treasury, in accordance with appropriation made by the act of Congress approved March third, eighteen hundred and seventy-three, entitled "An act making appropriations to supply deficiencies in the appropriations for the service of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-three, and for other purposes;" and the Governor is hereby authorized to draw said appropriation from the United States Treasury, and deposit the same in the treasury of the District of Columbia, to be used for the purposes hereinafter named: *And provided further*, That the appropriation hereby made shall be drawn by warrant of the Board of Public Works, and applied by them in the erection of a building for the District offices, and for no other purpose whatever, fifteen thousand dollars.

Approved June 26, 1873.

Acts of 3d Leg. Ass., p. 71.

G.

And this is the "arrangement:"

Memorandum of Agreement—Governor and Board of Public Works with the Washington Market Company.

In pursuance of the act of Congress of March 3, 1873, authorizing the Governor and Board of Public Works, if they deem it advisable, for the purpose of erecting thereon a suitable building for District offices, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, it is hereby agreed that—

1. The Washington Market Company shall by good and sufficient quit-claim deed release and convey to the District of Columbia all the title and interest of said company, acquired under act of Congress of May 20, 1870, incorporating said company, in and to so much of the land within said District described in section two of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the following limits:

Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly line of Pennsylvania and Louisiana avenues; and thence on a line parallel with the aforesaid southerly side of Pennsylvania avenue to the westerly line of Seventh street, at a point eighty-six feet from the corner began at; thence northerly along the west line of Seventh street eighty-six feet, to the corner began at.

The Washington Market Company shall also, in said deed, convey to said District the right to use in common with said Market Company, as a passage-way and court-yard, all the land between the lot conveyed in said deed and a line drawn westerly from Seventh to Ninth street, ten feet north of the north walls of the present Seventh and Ninth street buildings of said Market Company.

2. In consideration of the aforesaid release and convey-

195 of the proof, but to the satisfaction of the jury. The true rule requires abandonment or change of domicile, and the intention so to change to be proved by very satisfactory evidence.

The same instruction is repeated in the next clause of the charge, as follows: "If such a continuous and always fixed intention has been proven to your satisfaction by the testimony offered by defendant, or otherwise in the cause, there is no doubt of the law. It would defeat the presumption arising from actual residence, unless on the other hand, you are convinced by the plaintiff that his intention to remain in Tennessee has been demonstrated."

To this defendant excepted, when given on the trial, because again the defendant is required to overthrow the prima facie case of mere residence by proof to the satisfaction of the jury, not by a preponderance of testimony.

Def't also excepted at the same time to the sentence of the charge immediately preceding this, as a clear indication by the court of his opinion being in favour of plaintiff, and the last sentence destroys the previous instruction.

196 The same exceptions were taken to the following clause: "The intention to keep Alabama as his permanent home and abiding place notwithstanding all the facts and circumstances in this case, must be proven to you by defendant." This was excepted to as a clear indication by the court to the jury that all the facts and circumstances in the case were opposed to defendant's theory, and he had to prove the contrary, not show it by a preponderance of proof, but prove it, whereas a mere preponderance of the testimony in favour of Alabama as Quarles' domicile at the time of his death entitled defendant to a verdict, and indeed the burden was on plaintiff. The court added to this last sentence the two following: "That is your only inquiry. Has that fact been satisfactorily proven to you? This is the only question you have to determine." To this defendant also excepted on the trial, when given, on the same ground as the two last, that is, that if the preponderance of the testimony was in favour

197 of the Alabama domicile on the whole case, then defendant was entitled to the verdict of the jury; and again, that mere residence did not prove the intent and the intention.

The following instruction deft. also excepted to when given, and the same was allowed by the court. The instruction was as follows, viz: "The Supreme Court of the United States says 'that intention may be inferred from the circumstances or condition in which a person may be as to the domicile from which he has removed in fact.' Hence you may look to the condition of the man in respect to his domicile as it existed when he left, and all along during the twelve or fifteen years during which he was continuously absent from it, with occasional visits to his mother, who remained there; you may look to his mother's condition all the time, and say whether those facts and circumstances indicate an intention to keep that as his abiding place, or whether they were such as would make a residence and domicile elsewhere necessary or desirable."

198 Deft. excepted to this instruction, first, because it directed the attention of the jury to only a few unimportant circumstances, wholly failing to direct attention to others in the testemoney, such as his claim of retaining Alabama as his home, his refusal to register as a voter

G.

And this is the "arrangement:"

Memorandum of Agreement—Governor and Board of Public Works with the Washington Market Company.

In pursuance of the act of Congress of March 3, 1873, authorizing the Governor and Board of Public Works, if they deem it advisable, for the purpose of erecting thereon a suitable building for District offices, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, it is hereby agreed that—

1. The Washington Market Company shall by good and sufficient quit-claim deed release and convey to the District of Columbia all the title and interest of said company, acquired under act of Congress of May 20, 1870, incorporating said company, in and to so much of the land within said District described in section two of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the following limits:

Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly line of Pennsylvania and Louisiana avenues; and thence on a line parallel with the aforesaid southerly side of Pennsylvania avenue to the westerly line of Seventh street, at a point eighty-six feet from the corner began at; thence northerly along the west line of Seventh street eighty-six feet, to the corner began at.

The Washington Market Company shall also, in said deed, convey to said District the right to use in common with said Market Company, as a passage-way and court-yard, all the land between the lot conveyed in said deed and a line drawn westerly from Seventh to Ninth street, ten feet north of the north walls of the present Seventh and Ninth street buildings of said Market Company.

2. In consideration of the aforesaid release and convey-

ance by the Washington Market Company to the District of Columbia, the *District will assume and fullfil all obligations imposed upon the company by section* 14 *of said act of May* 20, 1870, (*as modified by act of the Legislative Assembly* of the District *of August* 23, 1871,) *except as follows*:

The Market Company shall pay annually to the District of Columbia, during the term, and for the purpose mentioned in said section fourteen, *the sum of seven thousand five hundred dollars*, payable quarterly, which sum shall during said term be in the place of all rental for the ground occupied by the market buildings of said company; *and in case in any year the general District taxes upon said ground and market buildings shall exceed five thousand five hundred dollars, the excess above that amount shall be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for rental and taxes shall not exceed thirteen thousand dollars;* the District however, not hereby releasing, but expressly reserving, and the Market Company hereby confirming, the right of the District, given by section two of the act of May 20, 1870, of fixing and controlling, for the protection of the market dealers and of the public, the amount of rentals of the stalls and stands in said market buildings; and it is also hereby agreed that the annual rental of stalls and stands in the other markets in the city of Washington shall not be fixed by the District authorities at a lower rate per square foot of area than seventy per cent. of the rate fixed under said section for stalls and stands in the market buildings of said company; and the District shall not use the land released and conveyed as aforesaid for the purpose of a market.

This agreement shall take effect April 1, 1873, and the Market Company shall at once settle its past rental account to that time at the rate, since August 23, 1871, fixed by the resolution of the Legislative Assembly of that date; and shall immediately pay the balance due the treasurer of the District.

Possession of the land conveyed shall be given the District upon the day of executing this agreement.

Dated at Washington, March 18, 1873.

WASHINGTON MARKET COMPANY,
By M. G. EMERY, *President.*

H. D. COOKE, *Governor*,
ALEX. R. SHEPHERD,
JAMES A. MAGRUDER,
S. P. BROWN,
3 ADOLF CLUSS, *Board of Public Works.*

H.

Indenture.

This indenture, made this 18th day of March, A. D. 1873, between the Washington Market Company, a corporation duly organized under act of Congress of May 20, 1870, and doing business in Washington, in the District of Columbia, of the first part, and the District of Columbia of the second part—

Witnesseth, that the said party of the first part, for and in consideration of divers agreements on the part of said District this day made, and of one dollar in lawful money of the United States, to it in hand paid by the said party of the second part, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, its successors and assigns forever, the following described real estate, situated in the city of Washington, District of Columbia, to wit, all the right, title, and interest of said party of the first part, acquired under act of Congress of May 20, 1870, incorporating said company, in and to so much of the land within said District, described in section 2 of said act, and fronting Pennsylvania and Louisiana avenues, as is contained within the following limits:

Beginning at the southwest corner of Seventh street and Pennsylvania avenue; thence westerly along the southerly side of Pennsylvania avenue to its intersection with the southerly side of Louisiana avenue; thence westerly along the southerly side of Louisiana avenue to the east side of Ninth street; thence along the east line of Ninth street eighty-six feet; thence easterly on a line parallel with the aforesaid southerly line of Louisiana avenue to a point eighty-six feet south of said intersection of the southerly lines of Pennsylvania and Louisiana avenues; and thence on a line parallel with the aforesaid southerly side of Pennsylvania avenue to the westerly line of Seventh street at a point eighty-six feet from the corner begun at; thence northerly along the west line of Seventh street to the corner begun at: Together with the right to said District of Columbia to use, in common with said party of the first part, as a passage-way and court-yard, all the land between the lot above-described and a line drawn westerly from Seventh to Ninth street ten feet

north of the north walls of the present Seventh and Ninth street buildings of said party of the first part; together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise however, of the said party of the first part, of, in, to, or out of the said piece or parcel of ground and premises.

To have and to hold the said piece or parcel of ground, and premises and appurtenances, unto the said party of the second part, its successors and assigns, to their sole use, benefit, and behoof forever. And the said party of the first part, for itself, and for its successors and assigns, hereby covenants, promises, and agrees, to and with the said party of the second part, its successors and assigns, that the said party of the first part, and its successors, shall and will warrant and forever defend the said piece or parcel of ground, and premises and appurtenances, unto the said party of the second part, its successors and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through said party of the first part, its successors or assigns; and, further, that the said party of the first part, and its successors, shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, its successors or assigns, make and execute all such other deed or deeds, or other assurances in law, for the more certain and effectual conveyance of the said pieces or parcel of ground, and premises, and appurtenances, unto the said party of the second part, its successors or assigns, as the said party of the second part, its successors or assigns, or their counsel learned in the law, shall advise, devise, or require.

In testimony whereof the said party of the first part has hereunto set its hand and seal, on the day and year first hereinbefore written.

THE WASHINGTON MARKET COMPANY.
M. G. EMERY, *President.*
MOSES KELLY, *Treasurer.*
(Duly authorized.)

Signed, sealed, and delivered in the presence of—
[SEAL.] E. McB. TIMONEY.

DISTRICT OF COLUMBIA, }
City and County of Washington, } *ss:*

I, Edward McB. Timoney, a notary public in and for the District and county aforesaid, in said city of Washington, do hereby certify that Matthew G. Emery, president, and Moses Kelly, treasurer of the Washington Market Company, party of a certain deed, bearing date on the 18th day of March, A. D. 1373, and hereto annexed, personally appeared before me in the city of Washington aforesaid, the said Emery and Kelly being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed, and the act and deed of said Washington Market Company.

Given under my hand and notarial seal this 18th day of March, A. D. 1873.

[SEAL.] (Signed) E. McB. TIMONEY,
Notary Public.

[Endorsement.]

Deed, Washington Market Company to the District of Columbia. 9:30 A. M. Received for record March 22, 1873, and recorded in liber No. 712, folio 291, *et seq.*, one of the land records for the District of Columbia, and examined by S. Wolf, recorder. Geo. F. Schager, deputy.

I.

The following are among the allegations of the special plea admitted by the demurrer to be true:

"That the value of the interest of the District in said City Hall building having been determined by appraisers selected by the Secretary of the Interior, under said act of March, 1873, at seventy-five thousand dollars, said sum was duly paid by the United States to the District, was accepted by the District legislature, and said legislature, by act of June 26, 1873, appropriated said sum and fifteen thousand dollars in addition, making ninety thousand dollars in all, to be drawn by the Board of Public Works for the erection of said building for District offices, from which appropriation payments were made for erecting said building on said land, as aforesaid."

OBSERVATIONS.

The failure of the original corporation to go on under

the charter left it open to the members of the present company, who say they were at once wrecked upon the inexorable rock of their own integrity, as was to be expected. To their refusal to recognize the corrupt claims of the parties who lobbied the charter through Congress, they attribute their own misfortunes. In view of the many disasters that have attended their career, one is prepared to deplore with them their early virtues.

The company, thus organized and handicapped, was, by the provisions of the 11th section of the charter, required to commence its buildings within 60 days after receiving possession of the land, and complete them within two years after the commencement. The providence of a fire kindly cleared the ground for them in December, 1870, and they admit they were liable for rent from the first day of January, 1871.

By reference to the specifications it will be seen that the company was to erect a magnificent block of buildings, fronting and covering their market-house, four stories high, extending from Seventh to Ninth streets, and finished in an elaborate style and perfect manner, an elevation of which is still admired in the rooms of the committees for the District of Columbia. (See Specifications, 16 Stats., 128.) Its cost, as etimated by Senator Freelinghuysen, would be $700,000. (Senate Rep. No. 661, 2d sess., 43d Cong., p. 3.) Senator Morrill, of Vermont, estimated it at $600,000. (Senate Rep. No. 449, 1st sess., Id., p. 5.) Both Senators say that the principal inducement to make this grant to the company was to secure the erection of this block without other cost to the United States or to Washington. Notwithstanding these promises, we find on the 18th of March, 1873, two months and a half after the latest time at which this should have been completed, the Market Company getting rid of the vacant unbroken ground on which it was to stand by this arrangement with the District. It had made not the least movement toward the construction of the block, nor had it ever intended to.

THE QUESTIONS.

These, as will be seen, however variously framed, are really one. Had the District authorities power to enter into the arrangement, as it is significantly called?

The court below held that it had. This holding is our substantial.

ASSIGNMENT OF ERROR.

1. In support of our views I shall consider the powers of the parties independent of the act of March 3, 1873, and their relations to the subject-matter.

2. The act of March 3, 1873. How it was passed, what it is, and the powers it confers.

3. The nature and character of the arrangement itself, and what it involves.

FIRST.—*a.* THE DISTRICT OF COLUMBIA.

It cannot be contended that the District had any power to acquire this property under any provision of the organic law.

Sec. 53 provides that "the District shall never pay, *assume* or become responsible for the debts, or liabilities of, or in any manner give, loan, or extend its credit to, or in aid of, any public or other corporation, association, or individual." (Rev. Stats., D. C., p. 6:)

SEC. 55 declares "the legislative assembly shall have no power to *release*, or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to the District, or to any municipal corporation therein," &c. By the 14th section of the charter of the defendant, it became indebted to the corporation of Washington in the sum of $25,000 per annum, for the benefit of the poor. By the second paragraph of this arrangement, the District undertakes to *assume* this very debt in violation of the 53d section.

It also undertakes to *release* the Market Company from a payment of a part of the same, in violation of the 55th section referred to.

The 12th section of the charter authorizes the corporation of Washington, under certain conditions, to acquire the property contemplated by it; to effect which the further legislation of Congress is expressly made necessary.

b. THE MARKET COMPANY

was created by Congress for the express purpose of holding and using the land.

The 13th section of the charter vests such land in the defendant for ninety-nine years, "and said estate shall be taken and considered as a determinable fee."

Plowdon and others say that a determinable fee is an estate which may continue forever. This has *one* of the features of a determinable fee, though it certainly cannot continue forever. Nor could it be acquired by the corporation, except by a vote of the councils thereof, and act of Congress as provided by the twelfth section. Nor could Congress repeal the charter in any indirect way.

The company should hold it for ninety-nine years, maintaining a market on one part of it, erect and maintain a grand building on the other, and the whole charged with the annual payment to the corporation of $25,000 yearly for the whole time. Nor was there any power or condition annexed to the grant by which the company could escape, nor any means by which it could acquire a right and power to dispose of its franchises and shift its burdens to others.

The property is charged with the servitude of $25,000 rent per annum, which enters into the fibre of its property. The beneficiary was in existence, and the interest vested. The District became the trustee, and it could not acquire the property; nor could it and the defendant in any way change or modify any of the conditions of the trust. It may be doubted whether Congress itself could, even by a direct exercise of its power in the premises.

Thus, then, we have Congress the owner of the property in fee, dedicating it to a specific purpose for ninety-nine years. It calls into existence, by special act of creation, a

person to hold it and execute that purpose, with power for no other use or object.

As a legal consequence of this action it ordains that this property shall be used for no other purpose whatever. It forbids all other possible uses and purposes by withholding all power in the premises. There was no power on the part of the Market Company to sell; none on the part of the District to buy.

This brings us to the consideration of—

SECOND.—THE ACT OF MARCH 3, 1873,

as the sole source of power in the premises.

It can never be presumed that Congress would intend any other and different disposition of this property, unless such intention is clearly expressed. All acts bearing upon this matter must be construed in harmony with this disposition, if such construction can be fairly made. Any other will be yielded with reluctance, and only on legal compulsion.

In reference to the act to be considered, Senator Morrill says: "It cannot be supposed that many members of Congress understood this item (the paragraph referred to) inserted in a deficiency bill on the last day of the session, or the 3d of March, 1873, as having anything to do with the Washington Market Company." (See his report, p. 3, cited above.) It will appear that much stronger language was necessary to justly characterize the passage of that "item" through the House.

I quote from the *Congressional Globe* the entire debate upon it in the House, as throwing a flood of light on what the House supposed it was dealing with, and its own judgment of what it supposed it had done. I think an examination of the act will show that a resort to this debate is allowable to a clear understanding of its scope, extent, and intent.

In Committee of the Whole on the deficiency bill, reported from the Committee on Ways and Means by Mr. Garfield, March 1, 1873, this paragraph is reached, and—

The Clerk read as follows:

For the purchase by the United States of the interest of the District of Columbia in the present City-Hall building in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers to be selected by the Secretary of the Interior, not exceeding $100,000, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets.

Mr. GARFIELD, of Ohio. In order to correct a misprint, I move to amend the paragraph just read by striking out "one hundred" and inserting "seventy-five," so as to make the amount of the appropriation $75,000.

The amendment was agreed to.

Mr. COBURN. I move to amend by striking out "seventy-five" and inserting "thirty."

Mr. ROOSEVELT. I wish to make a point of order on the paragraph. My point is that there is no law authorizing this appropriation.

The CHAIRMAN. The Chair would inquire from the chairman of the Committee on Appropriations, what is the object of this provision?

Mr. GARFIELD, of Ohio. The gentleman from Maryland, [Mr. Swann,] who had charge of this matter as chairman of the sub-committee, will explain it.

Mr. SWANN. This application was made to the Committee on Appropriations by the District government. The House is aware—

The CHAIRMAN. The Chair may expedite the decision of this question by inquiring for what purpose this building is used?

Mr. SWANN. It is used mainly by the Government of the United States for the occupancy of its judiciary. The District government has retired from the building.

The CHAIRMAN. The Chair rules that this appropriation comes under the head of contingent expenses to carry on the Government. The point of order is overruled.

(Cong. Globe, Part 3, 3d Sess. 42d Cong., pp. 1993–4.)

Mr. SWANN. The gentleman from Indiana [Mr. Coburn] is entirely mistaken in his statement as to the cost of this building. Judiciary Square, upon which the building is situated, belongs exclusively to the Government with the exception of the City Hall, which cost originally about $150,000, the Government contributing a very small pro-

portion of the cost. The city represents an interest in this building of the amount above stated, for which she has a just claim upon the Government. The city government now proposes to turn over its interest in the building, which is now used almost exclusively by the United States courts, to the Government for such sum as the Committee on Appropriations may think proper and reasonable.

The sub-committee who had this matter in charge examined into the cost of the building and the general condition of that property so far as it appertained to the courts of the Government. I found, sir, in order to reproduce a hall suitable for the accommodation of the courts, it could not be done at a less sum than perhaps two hundred or two hundred and fifty thousand dollars. I believe at the existing rates of labor and materials, as things now stand, the Government might be involved in an expense of perhaps $300,000 in reproducing that property. The price at which it is fixed by the Committee on Appropriations is $75,000; a very moderate sum for such a building as the City Hall.

Mr. CREBS. Why is it in this paragraph the committee say they shall *buy land between Seventh and Ninth streets on Louisiana avenue? Why do we fix the place?*

Mr. ROOSEVELT. I move to strike out the entire paragraph.

The CHAIRMAN. The pending question must first be disposed of. First, to strike out "$100,000" and insert "30,000," and strike out "$75,000" and insert "$30,000."

Mr. COBURN. That is a mistake; there is no motion for an appropriation of $100,000.

Mr. GARFIELD, of Ohio. I will state that the committee reported $75,000, but the printer got it $100,000.

The CHAIRMAN. Debate is exhausted.

Mr. CHIPMAN, delegate from the District of Columbia. Mr. Chairman, I have a letter on this matter which was brought to the attention of Congress through the memorial of the Governor, from the supreme court of the District, stating that the entire building is needed for the courts of the District. These are United States courts. In every city of the Union Congress has provided means for holding United States courts, and what has been remarked by the gentleman from Maryland, [Mr. Swann,] who has charge of this item, is true. The building could not be erected to-day for this sum. The reimbursement here is only $75,000, which practically is but a reimbursement of one-half of the

amount expended by the District. I believe that is all that ought to be said on the subject.

Mr. MERRICK. Mr. Chairman, it is absolutely necessary the Government should have possession of that building for the purpose of holding its courts. Business has increased during many years past to such a degree that it is necessary the Government should have entire possession of this structure. To be sure some years ago it was sufficient. But now, so far as the dispensation of justice in this District is concerned, it is necessary we should provide appropriate accommodations for the United States courts. The proposition I think is not only just, but generous on the part of the corporate authorities of this District, and it is no more than reasonable they should have all the allowances asked for made to them. The property to the Government is worth more than double the appropriation provided for in the bill. It is false economy in my judgment to object to this, and I hope the objection to the amendment of the committee will not prevail.

The CHAIRMAN. The question recurs on Mr. Coburn's amendment, to strike out "$75,000" and insert "$30,000."

The committee divided; and there were—ayes 41; noes 68.

So the amendment was rejected.

Mr. ROOSEVELT. I move to amend by striking out all after the words "United States," in line six hundred and seven, and inserting the words "to be expended under the direction of the Secretary of the Interior."

Mr. Chairman, I wish to explain as far as I can to the House the real purpose of this provision as I apprehend it. It is in order that the property belonging to some of the members of this Board of Public Works may be purchased, and you will be surprised when you look at that clause to see the peculiar phraseology which has been used. In the first place, there is no provision that the Board of Public Works shall expend this money at all until you come to the clause which I move to strike out, and which reads as follows: "And the Governor and Board of Public Works are authorized;" the Governor is a part of the Board of Public Works, and need not be named at all; but it provides:

And the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets.

If you will think but a moment it will be apparent they

will locate there or anywhere else unless some legal or technical difficulty is in the way, and that legal and technical difficulty arises directly with this company of which they are stockholders desiring to sell that property to themselves at an exorbitant figure. I do not agree with the remark made by gentlemen on the floor as to the necessity of this purchase. Having been required to examine it last year, I still think if the House passes this provision it will allow these gentlemen to purchase their own property for this purpose.

The building was examined last year by the Committee for the District, as they had been informed that the Board of Public Works did not find sufficient accommodations in it, and wanted to hire other premises. They hired two additional buildings and left this almost entirely; so that it will be seen that they had no further possible conceivable use for it; and it was not until that time that the idea entered their minds to sell it to the United States, placing on our shoulders this expenditure of $100,000. And then they united with that the further intention of buying property which belongs to a company in which they are interested as stockholders, if I apprehend the latter part of this proposition correctly, and I believe that I do; because I imagine that under no other circumstances would they have put that clause in. Now, all I ask by my amendment is simply this: that they shall not be authorized to buy property there, but that it shall be the duty of the Secretary of the Interior to buy property for the purpose, wherever it may be found desirable, and at a fair price.

Mr. ELDREDGE. My friend from New York [Mr. Roosevelt] has studied this subject so much, and devoted his attention to it to such an extent, that he cannot get anything into his head, I believe, except opposition to the Board of Works, as he calls it for short. Now, Mr. Chairman, as I understand this proposition, it is simply this: *there is an open space, a reservation belonging to the United States, upon which it is desirable to have built a hall for the use of the officials of the city of Washington;* and they propose to build a hall worthy of the city, one that will be suitable for conventions to assemble in, one that shall be capable of accommodating such assemblages as may gather here for the whole country of the United States. My friend from New York cannot see beyond the single idea that there is something fraudulent in this thing; and he says, gratuitously, I think, that perhaps the object of these gentlemen is to sell to

themselves or to sell to the city some of their own property. Now I ask the gentleman to state candidly if he knows that fact to be true.

Mr. ROOSEVELT. I understand that it is.

Mr. ELDREDGE. Or whether he states it as a mere piece of scandal, coming from some gossiping old woman, with which he has filled his head, without there being any truth in it.

Mr. ROOSEVELT. The gentleman speaks of a reservation—

Mr. ELDREDGE. *Will the gentleman answer my question? Does he know what he has stated here to be a fact, that these gentlemen own any property which they desire to have purchased for the purpose of this building which they propose to erect?*

Mr. ROOSEVELT. *I was informed that it was the property of of the Metropolitan Market Company which they intended to purchase.*

Mr. ELDREDGE. *There is no purchase about it.* THAT IS THE PROPERTY OF THE UNITED STATES.

Mr. ROOSEVELT. I am informed that it is the property of the company of which they are stockholders.

Mr. ELDREDGE. *There is not a single member of the Board of Public Works who owns a dollar's interest in that property. I state that now as a fact. The gentleman has been misinformed by the men who have come and whispered these scandals into his ears.*

Mr. ROOSEVELT. Does the gentleman deny that they are interested in that property?

Mr. ELDREDGE. *I say that it is the property of the United States, and that they do not desire one single foot of property beyond the property of the United States; and I say that what the gentleman from New York has stated here is a slander.* I do not say that the gentleman means to be guilty of slander, although I might perhaps infer that from the ready belief he gives to those who get up these scandals.

I desire to have read at the Clerk's desk the statement of Chief Justice Cartter and the other justices in regard to this matter.

The Clerk read as follows:

CITY HALL, WASHINGTON, D. C., *February* 10, 1872.

SIR: You inquire of the justices as to the City Hall accommodations for holding the several courts under the authority of the supreme court of this District.

The City Hall furnishes three chambers capable of accommodating the courts, to wit: the circuit court-room, the criminal court-room, and

chancery court-room. These three rooms are occupied by the several courts, including the supreme court in general term, substantially throughout the year.

The remaining habitable rooms of the City Hall are occupied by the marshal, the clerk, recorder of deeds, register of wills, surveyor of the District, and the law association, with their library.

Before the organization of the present government of the District the circuit court-room was occupied in common with the city council—the council sitting at night; the present equity and probate court-room by the board of aldermen. This joint occupancy was incompatible with the comfort or convenience of either.

Proper regard for the public service required more room; and, as the matter now stands, we have no more chamber accommodation than is indispensable to properly work the courts. Indeed, we have no room at all for the accommodation of the justice holding a United States district court.

D. K. CARTTER, *Chief-Justice.*
A. B. OLIN.
A. WYLIE.
D. C. HUMPHREYS.
ARTHUR McARTHUR.

The question recurred upon agreeing to the amendment of Mr. Roosevelt.

Mr. CHIPMAN. I think there is some misapprehension as to the scope of the language of this provision. *It does not authorize the board absolutely to purchase, but only to make arrangements about the securing of the property. The securing of the property must be done hereafter by Congress.* This does not authorize the board to disburse the money; it only gives the board authority to make arrangements to secure the property.

The question was taken on Mr. Roosevelt's amendment; and on a division there were—ayes 42, noes 98.

So the amendment was not agreed to.

The question recurred upon Mr. Roosevelt's motion to strike out the paragraph.

Mr. FARNSWORTH. I move to strike out the words "the Governor and Board of Public Works," and to insert in lieu thereof "the government of the District of Columbia;" so that it will read:

For the purchase by the United States of the interest of the District of Columbia in the present city hall building in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers to be selected by the Secretary of the Interior, not exceeding $100,000, the same to be applied by said District only for the erection of a suitable building for the District offices, and the government of the District of Columbia is authorized, if it deems it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets.

This will authorize the government of the District of Columbia *to obtain ground for this purpose if they can.* I do not

see why we should put this authority in the hands of the Board of Public Works and give them the control as to what site shall be purchased for a government building for the District of Columbia, and especially when this Board of Public Works is not free from suspicion; and in view of all the charges made against them, it seems to me that this Congress ought to be chary in conferring more power upon them.

Mr. GARFIELD, of Ohio. I have no objection to that amendment.

Mr. ELDREDGE. I rise to oppose the amendment, and I want to say one word. I would like to know what the gentleman from Illinois means by the District Government? Wherein, I ask him, is there any benefit to be secured by making that amendment? What is the District government?

Mr. FARNSWORTH. Do you want an answer?

Mr. ELDREDGE. Yes.

Mr. FARNSWORTH. I will give it to you in a very few words. The District government is in fact the Board of Public Works, but it is by law composed of a council and an assembly and a governor, but the Board of Public Works is in fact running the whole machine.

Mr. ELDREDGE. I cannot let the gentleman answer me in that way. The gentleman has given the very best reason in the world why we should not make this change; he has given the best reason that the bill is right as it now stands. The gentleman says that the Board of Public Works is the District government. I undertake to say that the gentleman is wrong as to that. The District government is composed of a legislature of two bodies, one appointed by the President and one elected by the people. They have to pass laws and to appoint commissioners. They cannot act as a government. They must act through their agents, and what better agents can they have than a governor and a board appointed by the Federal Government? Why, then, go to work by indirection in this way? Why not let the governor of the District of Columbia and these gentlemen who compose the Board of Public Works act on their own responsibility, and if they act wrongly the President can remove them?

[Here the hammer fell.]

The question was taken on Mr. Farnsworth's amendment; and on a division there were—ayes 30, noes not counted.

So the amendment was not agreed to.

The question recurred on the motion of Mr. Roosevelt to strike out the paragraph.

Mr. BECK, of Kentucky. Before the question is taken on the motion to strike out this paragraph, I move to amend it by adding the following:

And no money shall be expended under this provision until authority is given by Congress, after a report by the Governor and Board of Public Works, as to the selection made by them as herein authorized.

My idea is that if they are authorized to make this selection all difficulty would be obviated by requiring them to make report to us, so that if we approve their action we can make an appropriation to carry it out.

Cong. Globe, Part 3, 3d sess., 42 Cong., pp. 1994–5.

Mr. COBURN. I move to amend the amendment by adding to it as follows:

Provided, The Government of the United States shall not be liable for any expenditure for said land, or for the purchase-money therefor, or for the building to be erected thereon, and no land or the use thereof is hereby granted for the purpose of erecting any buildings thereon for such building.

The amendment to the amendment was adopted—ayes 84, noes not counted.

The CHAIRMAN. The question is next on the amendment of the gentleman from New York [Mr. Roosevelt] as now amended.

Mr. ELDREDGE. That will simply put it off a year; that is all the object of it.

Mr. HOLMAN. I object to debate.

The committee divided; and there were—ayes 44, noes 54; no quorum voting.

The CHAIRMAN, under the rule, ordered tellers; and appointed Mr. Eldredge and Mr. Roosevelt.

The committee again divided; and the tellers reported—ayes 57; noes 65.

So the amendment was not agreed to.

The CHAIRMAN. The question is next on the motion of the gentleman from New York [Mr. Roosevelt] to strike out the paragraph.

Mr. COBURN. I renew my amendment now as an amendment to the paragraph.

The Clerk read as follows:

Add to the paragraph the following words:

Provided, The Government of the United States shall not be liable for any expenditure for said land, or for the purchase-money therefor, or for the building to be erected thereon, and no land for the use thereof is hereby granted for the purpose of erecting any buildings thereon for such building.

The question was taken on Mr. Coburn's amendment; and it was agreed to.

The question recurred on Mr. Roosevelt's motion to strike out the paragraph; and being put, there were on a division—ayes four; noes not counted.

So the motion was not agreed to.

(Cong. Globe, Part 3, 3d Sess, 42 Cong., pp. 1996–7.)

The committee accordingly rose; and the Speaker having resumed the chair, Mr. Wheeler reported that the Committee of the Whole on the state of the Union, having had under consideration the deficiency appropriation bill, had directed it to be reported to the House with sundry amendments.

Mr. GARFIELD, of Ohio. I move the previous question on the bill and pending amendments.

The previous question was seconded and the main question ordered.

Mr. GARFIELD, of Ohio. Unless some gentlemen desire separate votes, I ask that the amendments reported from the Committee of the Whole may be concurred in *en masse.*

The amendments reported from the Committee of the Whole were concurred in.

The bill as amended was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

Mr. GARFIELD, of Ohio, moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

(Cong. Globe, Part 3, 3d Sess. 42d Cong., p. 2002.)

It needs not to be told who Mr. Eldredge was, nor his relations to the then powers of the District, and Market Company. He was later the Company's advocate before Congress.

Turn back to the passages from him which I have italicised, and though it was mildly suggested by Mr. Roosevelt that this land was the property of the "Metropolitan Market Company," Mr. Eldredge thrice asserts that the reservation is the property of the United States: "An open space, a reservation of the United States, on which it is desirable to build a hall for the use of the officials of the city of Wash-

ington; a hall worthy of the city," when he must or should have known that it was, by solemn act of Congress, transferred from the United States to the Market Company, who was pledged to set up a building more grand and extensive than was in his mind, which he elsewhere says shall cost $200,000 or $250,000. These assertions were accepted as true, and the bill passed, the House never dreaming that it was dealing with a property it had granted to another, and solemnly dedicated to another purpose.

In the dubity under which the House labored, it amended the original proposition as it came from Mr. Swann, so as to guard against all contingencies, and for a purpose hereafter stated.

These assertions of Mr. E. were made in the presence of our own delegate, [Mr. Chipman,] who must have known all about this matter if anybody did. He made haste to relieve all parties by explaining precisely what they were doing, its purpose, and extent. They were not authorizing the purchase of any property. They only authorized the District to make some arrangement to *secure* a purchase. "The securing of the property must be done through Congress." "It gives the Board authority to make arrangements to secure the property."

The committee, instead of adopting Mr. Beck's amendment directly, accepted it substantially in Mr. Coburn's proposition. This provision of the act passed the Senate without question.

Upon this point see the following: *Blake* vs. *National Banks*, 23d Wall., 308; *United States* vs. *Union Pacific Railroad Co.*, 1 Otto, 72; and case in 3d Howard, 9.

Suppose I may not refer to this debate, I consider the nature and extent of the power granted and what was sought to be done under it.

THIRD.—THE ARRANGEMENT.

I now proceed to examine the arrangement itself, and shall have occasion to return to the act.

The arrangement stipulates--

1st. For the transfer to the District by the Market Company of its title and interest (received under the act of May 20, 1870) to the front between Seventh and Ninth streets, and 86 feet deep.

2d. The District shall assume and fulfil all obligations imposed on the company by section 14 of its charter, as modified by act of the District Legislature of August 23, 1871. That is, it shall take upon itself the burden of the $25,000 per annum, and discharge the company from its liability.

3d. Instead of that sum the company shall pay the District the annual sum of $7,500.

4th. The District agrees that the residue of the ground granted to the company, and its buildings thereon, shall never be taxed to exceed the sum of $5,500 for every year.

5th. If, however, the rate of taxation and valuation (by appreciation of property or otherwise) shall exceed that sum, the excess shall be deducted from the rental, so that the company shall never pay the total amount of rent and taxes in excess of $13,000.

6th. The District shall never fix the rental of stalls and stands in the other markets of Washington at a lower rate than 70 per cent. of the stalls and stands in the market of the company; nor shall the District use the land it thus acquires for a market.

7th. The agreement is to take effect April 1, 1873, and the company to settle its rental account to that time, from August 23, 1871, at the rate of the resolution of the District Legislature of that date, referred to as the act of the Legislature.

It is remarkable that the parties could have supposed that the resolution referred to (see page 14) undertook to change the amount of the rent to be paid by the company. It merely authorizes the Governor to use his influence to induce Congress to reduce the amount from twenty-five to twenty thousand dollars, and thereupon that was taken as

an accomplished fact, and twenty thousand dollars assumed as a basis of the arrangement; which was false to start with, and no valid arrangement could be made to rest on it.

Although the defendant alleges that it paid, under the arrangement, all that was due the plaintiff, such is not the fact, as the record shows. Appended to the declaration is a statement of the account, which is not contradicted. By this there was due the plaintiff on the 1st of April 1873, the sum of $1,339.87. This on the basis of $25,000 from January 1, 1871, to August 23, 1871, and $20,000 to April 1, 1873. For this sum the plaintiff is in every view entitled to judgment.

For convenience I here produce the paragraph from the deficiency act as follows:

* * * * * *

"For the purchase by the United States of the interest of the District of Columbia in the present City-Hall building in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, *to make arrangements to secure sufficient land fronting* on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon, for such building."

17 Stats., 540.

If this act is to be construed as having reference to the land granted to the Market Company by its charter, then they are *in pari materia*, and must stand together. On its face it authorizes the District to do a certain thing. The District is a corporation, and its powers are to be strictly construed. If it applies to the Market Company, then the same rule applies. (Sedgwick on Stats., 1st ed., p. 340.)

a. What shadow of right does the authorizing act of Congress confer upon the parties to make *this* arrangement? Clearly, it does and can confer none on the Market Company. It is not even named in the act. Does any one believe that when Congress made the immense grant to the company, upon the consideration that it should pay $25,000 per annum for the support of the poor of the District, and build the grand structure named, that it could intend to permit the company to slip out from under both these great burdens, and thus secure the ground for its market-house and great market franchises for nothing, and so intending by that paragraph in the deficiency bill, it would not so much as name the company? That it would do it in the sly, underhand way, as is claimed—that, by authorizing the District to make an arrangement to secure the land, it therefore authorizes the company to part with it? This view puts it beyond cavil that this law was passed in actual ignorance of the subject-matter of it.

Congress could have intended no such thing, for below the grant to this company of the land lay the title of the United States, to whom the possession reverts on the termination of the company's estate, and the act declares "that no land, or the use thereof, is hereby granted for the erection of any building thereon." It would authorize the District to arrange to *secure*. It would grant nothing itself, and would and did authorize nobody else to grant land. It authorizes the Governor and Board of Public Works to make arrangements to secure the ground, and that is all. If they cannot do it, that is the end of it. If they find no land there which can be made available, or no party to deal with, there it stops. Congress says: "Now, go out to the corners of Seventh and Ninth streets and Pennsylvania avenue, and see what you can do for a building site." It don't even say which side of Pennsylvania avenue the building must stand. The Governor and Board go, and find on the north side a public reservation of the United States, which it can't take, for Congress says the United

States will grant no land. They go over south, and find land of the United States granted to a corporation for ninety-nine years for a special purpose. The United States refuses to grant its title, and the corporation has no power to alienate—cannot do it.

The Governor and Board can make no arrangement, and that ends the matter.

b. Suppose that in thus authorizing the District the act also authorizes the company to arrange with it, what is the extent of the power conferred? To purchase, close out the transaction, and take the company's title? Not at all. The act does not so say, as it would, had it so intended. Clearly this is not an act whose meaning is to be forced by construction beyond the obvious scope of its language. Had it intended that the officers of the District should buy, it would have so said. They are "authorized to purchase," would have been the language, and not "to make arrangements *to* secure," as the language is. They cannot even secure, but make an arrangement *to* secure, by some after action. When the whole matter is taken into consideration, if Congress is to be supposed to have understood what it was doing, what it intended was that the District should arrange and report back, and ask for the further aid of Congress to carry the arrangement out, if it saw fit; and hence, at that time, it would make no grant of its title to the land, and no appropriation of money: and it knew that without both the District could never build such a building as it required on that site. It would not permit the District to pay the $75,000 for land. Its use was expressly limited to the erection of a building. This was stated to be the actual scope and intent of the act on the floor before it was passed, as explained by Chipman, our delegate, who with that understanding, heard the statement of Mr. Eldredge in silence. (See his remarks, p. 26.) Nobody contradicted him. He was known to understand it. Doubtless he drew the act and got it adopted. If I am not entitled to this from Mr. Chipman, still this is the whole scope and intention of the

act. Its language is consistent with no other intention, and gives effect to all the provisions of the act, otherwise inexplicable.

c. If Congress did intend that the District, by making an arrangement *to secure*, should actually buy, would that authorize the convention entered into?

Does the language of this act authorize the District—

1. To discharge the company from the payment of the $25,000 for the poor—bearing in mind, all the time, that Congress has usually made an annual appropriation equal to that, for the relief of the poor of the District?

2. To discharge the company from the building of the great structure, pursuant to the specifications of its charter, and render its erection impossible?

3. Does it authorize the District to change the rate of taxation of the company's property, which the 13th section of the charter places in the status of all other property?

4. To tax the stalls and stands in the other markets for its benefit?

Clearly no construction can extend the language of the act to include these powers.

It is said that to authorize the District to acquire this property authorized it to do anything and everything necessary to accomplish it, and that it could secure it on no other terms, and therefore this is legal. This is the equivalent of saying that Congress did not intend that the District should complete the transaction, but only to ascertain the terms upon which it could be made, and report it to Congress. A view made certain when we recur to the provisions of the 12th section of the charter, by which the corporation of Washington might, after thirty years, become the owner of the whole property, *by the vote of the councils and the act of Congress only.*

d. If, notwithstanding the force of these views, the opinion shall prevail that the act of March 3d, 1873, authorized the District to do everything to secure a building on this

ground, and therefore the company had a right to make an arrangement with it for that purpose, this must be the scope of the powers of the parties, to so arrange, that while all the obligations of the company should remain unimpaired, the District should have its building.

This could be accomplished by a stipulation, that such a portion of the block to be erected by the company as was needed should be the property of the District, which of course should pay for its part of the building. This would relieve the company of so much of the expense and leave its liability to pay the $25,000, and erect said structure intact, and secure all the objects of both laws, the charter and act of March 3d, leaving them to stand together. The tax laws would then have their normal effect; Congress would act consistently, and all rights be protected.

Whatever may be the construction of this act, as has been made to appear, the company is, on its own showing, under the admissions of its plea, the debtor of the District.

The real motives which induced the very shrewd men then in charge of the District to make the arrangement, under the law, remain an inscrutable mystery.

I submit, however, that in no legal way can the special plea, and the ruling on the trial, be sustained.

A. G. RIDDLE,
For Plaintiff.

108-243

IN THE

Supreme Court of the United States, 1882,

No. 1933.

THE DISTRICT OF COLUMBIA, *Plaintiff in Error*,

vs.

THE WASHINGTON MARKET COMPANY.

In Error to the Supreme Court of the District of Columbia.

On Demurrer to Defendant's Special Plea.

BRIEF FOR DEFENDANT.

By WILLIAM BIRNEY.

NATIONAL REPUBLICAN PRINT.

INDEX.

	PAGE.
Action, short statement of	1
Defense, short statement of	1
Demurrer, case stands on	2
Demurrer, assigned grounds	8
Pleadings, date of	2
Pleadings, case on	4
Judgments of inferior courts	8
Leave to amend declaration, granted by general term	3
Trial, second, irregular	4
Plea, general issue—special	4
Courts, inferior, overruled demurrer	8
Points of law	9
Congress, power of, to reduce rent	9
Congress, power of, conferred on District	11
Congress, debate in	21
Statute of March 3, 1873, analysis of	12
Statute of March 3, 1873, made inoperative by pl'tiff's interpr'n	13
District competent to buy land	12
District estopped to deny competency of defendant to contract	19
Power construed in favor of grant	14
Rental reduced by District	14
Legislative Assembly satisfied, appropriates money to erect building	16
Ultra vires claim	16
Ultra vires claim, repudiation	17
Bill of exceptions, and answers	19—20
Plaintiff's brief, answer to	21
Charter of defendant and act of March 3, 1873, read together	22
Dates of leading facts	25
General term, opinion by	26

IN THE

Supreme Court of the United States, 1882.

No. 193.

THE DISTRICT OF COLUMBIA, *Plaintiff in Error*,

vs.

THE WASHINGTON MARKET COMPANY.

In Error to the Supreme Court of the District of Columbia.

On Demurrer to Defendant's Special Plea.

BRIEF FOR DEFENDANT.

By WILLIAM BIRNEY.

Stripping the action and defense of minor details, they may be stated as follows:

ACTION.

This suit is brought by the District of Columbia, in its own right, and as successor of the city of Washington, to recover balances due in the nature of rental for the premises granted for a term of years by the United States to the defendant Company; said rental having been made payable to said city. Two of the alleged balances are of date prior to April 1, 1873; the others are of subsequent date.

DEFENSE.

The company defends, because under the terms of an agreement which was made by it with plaintiff, March 18,

1873, and which, by its terms, went into effect, April 1, 1873, it settled its past rental account, paid all amounts due plaintiff to the last named date, and deeded to plaintiff all its interests in the most valuable portion of said premises, in consideration of plaintiff's surrender of a sum equal to the fair and just rental of the portion so deeded; that the fair and just rental for the part of premises retained by defendant was agreed to be $7,500 a year; which amount defendant agreed to pay quarterly, and has ever since fully and duly paid. That said agreement was duly executed; plaintiff accepted and recorded the deed, took possession of the front lot conveyed therein, began excavations for the erection of a District Building thereon and has ever since retained possession.

In effect, it is for the rent of the front lot, which from April 1st, 1873, has been in possession of the District, under deed duly recorded by it, that the District brings this suit.

The defendant submits that the said agreement was lawful and competent; but, whether it was so or not, the plaintiff cannot both retain the property and recover rent for it.

THE CASE STANDS ON DEMURRER TO SPECIAL PLEA.

The latter part of Record, beginning with the "*Replication* filed April 10, 1879" (Rec., fol. 16), and including said replication, the judgment of June 9, 1879, the "motion for new trial, on exceptions" of June 12, 1879 and the bill of exceptions of July 7, 1879, is not properly before this court. This is obvious on inspection of the record. See the different pleadings. (*The figures in brackets refer to he folios of the Record.*)

1875—November 23. Declaration filed [1].

1876—January 11. Plea of general issue [7].

1876—February 5. Joinder, notice of trial, case put on calendar.

1876—April 6. Special plea filed [8].

1877—April 21. Demurrer of plaintiff to special plea [12].

1877—December 15. Joinder in demurrer [13].

1877—December 31. Demurrer overruled [14].

1878—January 12. Judgment for defendant [15].

"Defendant moves for judgment on the demurrer, which is granted. Therefore, it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day and recover against the plaintiff the cost of its defense and have execution thereof, from which plaintiff prays an appeal to the General Term."

1878—January 12. Case calendared for general term.

1879—March 3. General Term affirms the judgment of the Circuit Court [16].

"And now, again, come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court here, that there was no error in the judgment of the Circuit Court in overruling the demurrer in said cause, now, therefore, it is considered that *the said judgment be* and the same is hereby *affirmed*, and that defendant recover against the plaintiff its costs about its defense aforesaid expended, March 3, 1879" [16].

1879—April 9. Attorney for plaintiff "moves the court for leave to amend the entry of judgment of March 3, 1879, by allowing the plaintiff *to amend its declaration* as it may be advised, and the same is granted."

The plaintiff did not profit by the permission of the court; no amended declaration was presented for the consideration of the General Term, and no order was made setting aside the judgment by the Circuit Court and the judgment of affirmance by the General Term, and remanding the case to the Circuit Court for a new trial on an amended declaration. As regarded the original declaration, the pleas and demurrer, the judgment of the two courts had been pronounced in favor of defendant. On those pleadings the case had been finally disposed of. In assuming that the judgments had been set aside, a new trial granted, leave given to try the case on the original pleadings, and the case

remanded, the action of the plaintiff was unauthorized. The second trial, June 9, 1879, was *irregular, and the proceedings therein void.* The bill of exceptions (18) on that trial cannot, it is submitted, be considered by this court. The case stands as if it had been brought up by writ of error immediately after the judgment of the General Term, March 3, 1879, affirming the judgment of the Circuit Court for defendant on the demurrer.

Dant *vs.* Dist. of Columbia, U. S. Rep., 1882.

CASE ON THE PLEADINGS

The declaration, filed Nov. 23, 1875, consists of two special and the usual money counts.

The first count sets out the parties and their respective incorporations by Congress; that by the 14th section of defendant's charter, defendant was to pay yearly to the city of Washington $25,000; that May 31, 1871, it owed $173.20 on the account, and still owes it to plaintiff as successor of said city.

The second count claims that from June 1, 1871, to November 1, 1875, defendant owes a balance af $53,847.23 on the same account.

A bill of particulars is appended, showing balances.

Pleas—

1. The general issue.

2. "And for a further plea, the defendant says: That, subsequent to the passage of said act of Congress of the 20th of May, 1870" [charter of defendant], "that is to say, on the third day of March, 1873:

a. The Congress of the United States passed a further act appropriating such sum for the purchase by the United States of the interest of the District of Columbia in the City Hall Building in Washington, then used solely for Government purposes, as might be determined by three impartial appraisers to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same *to be ap-*

plied by said District only for the erection of a suitable building for the District offices;

b. And in and by said act, the Governor and Board of Public Works were authorized, if they deemed it advisable for the purpose of the erection of said buildings, *to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets*;

c. Which land, so authorized by said act to be procured, was *a portion of the land granted to defendant company* by said act of May 20, 1870, in consideration of which said sum of twenty-five thousand dollars was to be paid annually to said city of Washington;

d. That subsequently, that is to say, on the 18th day of March, 1873, *in pursuance of said act* of Congress of March 3, 1873, an agreement was entered into by said District of Columbia, represented by said Governor and Board of Public Works, with said defendant company, by which, among other things, said company agreed that it would, by quit-claim deed, release and convey to said district, *for the purpose of the erection of said District building thereon*, all the right, title, and interest of said company, acquired under said act of May 20, 1870, in and to so much of the land described in said act, and *fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets*, as was described in said agreement, being a piece of eighty-six feet in depth along said avenues and between said streets;

e. And said defendant company agreed to convey to said District the right to use in common with said company as a passage-way and court-yard, all the land between the said land, so to be released and conveyed as aforesaid, and a line drawn from Seventh to Ninth streets, ten feet north of the Seventh and Ninth street buildings of said market company.

That, in and by said agreement, the said District of Columbia, amongst other things, in consideration of the aforesaid release and conveyance by said defendant company,

f. Agreed with said company, that said District would assume and fulfill all obligations imposed upon said company

by section fourteen of said act of May 20, 1870, (as modified by an act of the legislative assembly of the District, of August 23, 1871), except as follows:

g. That the market company should pay annually to the District during the tenure, and for the purpose mentioned in said section fourteen, the sum of seven thousand five hundred dollars, payable quarterly, which sum should, during said term, be in the place of all rental fee of the ground occupied by the market buildings of said company;

h. And that, in case in any year, the general District taxes upon said ground and market buildings should exceed five thousand five hundred dollars, the excess above that amount should be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for *rental* and *taxes* should not exceed thirteen thousand dollars.

i. That it was also provided in said agreement, that possession of the land conveyed should be given the District upon the day of executing said agreement.

j. That said agreement should take effect April 1, 1873, and that the defendant company should at once settle its past rental account to said April 1, *at the rate* after August 23, 1871, *fixed by the resolution of the Legislative Assembly* of that date, and should immediately pay the balance due to the treasurer of said District.

k. That, in pursuance of said agreement of March 18, 1873, said defendant company, by deed of release of that date, conveyed to said District, all said company's interest in said land and privileges, as in and by said agreement was required, which said deed was duly accepted by said District and recorded.

l. That possession of said land was delivered to and *taken by said District*, and the *work of erecting said District Building commenced* by said District and *possession of said land has ever since been and now is retained by said District;*

m. That the value of the interest of the District in said City Hall building, having been determined by appraisers se-

lected by the Secretary of the Interior, under said act of March, 1873, at seventy-five thousand dollars, said sum was duly paid by the United States to the District, was accepted by the District Legislature and said Legislature, by act of June 26, 1873, appropriated said sum, and fifteen thousand dollars in addition, making ninety thousand dollars in all, to be drawn by the Board of Public Works *for the erection of said building for District offices.*

n. From which appropriation payments were made for the work of erecting said building, on said land as aforesaid.

o. That, under the aforesaid act of May 20, 1870, there was granted to said defendant company, all the land fronting Pennsylvania and Louisiana avenues, between Seventh and Ninth streets, and extending southerly to the middle of B street, before that time known as Reservation Seven, or, Centre Market Space, with the provision that on the rear of said grounds should be erected public market buildings, and that on the front grounds should be erected, a building to be rented by said company for stores, offices, and other lawful purposes, to be determined by said company.

p. That prior to said agreement of March 18, 1873, said market buildings were duly erected, and opened, and occupied, as required by said act of May 20, 1870; that said front grounds were valuable to said company for the purpose of erecting said building for rental as aforesaid, and its rights therein were released and conveyed to said District only at the solicitation of the District officers, in pursuance of said act of March 3, 1873, and in consideration of said agreement by said District to assume and fulfill all obligations imposed upon said company by said section fourteen of said act, except the payment by said company of said annual sum of seven thousand five hundred dollars.

q. That, immediately upon the execution of said agreement of March 18, 1873, said defendant company settled its past rental account, and paid all amounts due to said date, and that since said date, said company has duly paid to said District, said sum of $7,500 annually, as required by said agreement, wherefore, &c.

To this special plea, *demurrer* was filed. Joinder.

ACTION OF INFERIOR COURTS.

The Circuit Court overruled the demurrer, and gave judgment for defendant. This judgment was unanimously affirmed by the justices in General Term.

THE ASSIGNED GROUNDS OF DEMURRER.

These are four in number (12). Each of them assumes that the plea contains averments which are not to be found in it; the *first* and *second*, that the Legislative act of August 23, 1871, *reduced the rental* required by act of Congress, to be paid by defendant; the *third*, that the defendants made a *conveyance of land* to plaintiff, and the *fourth*, that the District *bought the land*.

It is true that the plea, (see clause *f*) in a description of the contract made between the District and the company avers that the District agreed to "*assume and fulfill all obligations imposed upon said company, by section 14, of said act of May 20, 1870, as modified by said*" Legislative assembly act. This description of a contract made, without specifying the extent or nature of the modification, is certainly not an averment, either that the Legislature had reduced the rental or had authority to do so. If there was no modification, the quoted part of the contract was obligatory as to the said fourteenth section unmodified It may be conceded in this argument, that the parties to the contract were in error, in alluding to that section as having been modified; the concession does not impair the contract, nor exempt the pleader from the necessity of quoting it as it was made. The true meaning of the allusion is obvious on the examination of the next clause (*j*) of the plea, in which the rate of rent mentioned in said Legislative Assembly act is taken as the basis on which the defendant was to pay rent from August 23, 1871. To make the allusion an averment as to the lawful authority of the Legislative Assembly, or the legal effect of one statute upon another is to strain and pervert it. No

right whatever had been claimed by defendant under said Legislative Assembly act, and none has been claimed since that time. Defendant's rights grow out of the contract set up in the plea.

As to the *third* and *fourth* assignments, the assumptions that the special plea avers that the market company sold, and the District bought *land* may cover a sophistry. The plea was that the "company agreed that it would by quit-claim deed, release, and convey to said District, for the purpose of the erection of said building thereon, all the *right, title and interest* of said company, acquired under said act of May 20, 1870, in and to so much of the land," &c., and that it "conveyed to said District *all said company's interest*, in said land and privileges," &c.

The matters of law involved in this case will be more appropriately discussed under the following

POINTS OF LAW.

1st. Congress had constitutional power to reduce the rent fixed in section 14, of defendant's charter.

2d. Congress, by the act of March 3, 1873, conferred that power upon the District authorities.

3d. The District authorities exercised the power and reduced the rent.

4th. The District cannot recover for rental of real estate conveyed to it by deed, and of which it took, and has ever since retained possession.

1ST—POWER OF CONGRESS.

At the date of defendant's charter, (May 20, 1870), Centre Market space belonged exclusively to the United States.

It was owned free from all trusts, untrammeled by conditions. The United States had the right to do with it what

any private proprietor could do with his land. (*Van Ness* vs. *The City of Washington*, *4 Peters*). It could have sold, leased or given it away. It could have made the rent of it payable into the Treasury. If it had done so, unquestionably, it might have reduced the rent at any time, or released it altogether. What it did do, was to make it payable to the City of Washington, with directions that it should be expended in a certain manner.

But this did not divest Congress of its powers to control the rental. In the seventeenth section of the same act, it reserved expressly the right of amendment. If it had not done so, it might at any time have reduced or abolished the rental, or granted it to some other beneficiary. The grant to Washington City was *without consideration*, a pure *gratuity*, and subject, like all *bounties*, to be withdrawn by the granting power. *Pensions* are not matters of right, but of grace, and appropriations for charities may be discontinued at any time.

When the sovereign power releases its rights, all subsidiary claims perish; when the Secretary of the Treasury releases the rights of the Government to goods forfeited for violation of the customs laws, the claims of revenue officers for their legal share of the forfeited goods are gone. (See Salt Co., v. E. Saginaw, 13 Wall., 373).

Towns and cities "are incorporated for public and not private objects. They are allowed to hold privileges or property only for public purposes."

"Hence, generally the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions named, and, therefore, to be considered as not violated by subsequent legislative changes."

East Hartford *vs.* Hartford Co., 10 How. 511, 531.
Trustees *vs.* Tatman, 13 Ill. 30.
New Orleans *vs.* Hoyle, 23 La. Ann., 740.

The supremacy of the legislature over the funds and franchises of municipal corporations is asserted in

Amite City *vs.* Clements, 24 La. An. 27.
County *vs.* State, 11 Ill., 202.
Love *vs.* Schenk, 12 Ire. Law, 304.
Youngs *vs.* Hall, 9 Nev. 212.
People *vs.* Ingersoll, 58 N. Y., 1.
Home Ins. Co., vs, City Council, 93 U. S. 116.

"The powers conferred upon municipal corporations may at any time be altered or repealed by the Legislature."

Dillon on Municipal Corporations, sec. 85, second edition and authorities cited.

In Hagerstown *vs.* Sherer, 37 Md., 180, the court sustained a release by the legislature of a forfeiture which, by statute, was to go to the use of Washington County. The judgment was affirmed by the United States Supreme Court. 3 Howard, 534.

It is clear, then, that Congress had the power to reduce the rent fixed in section 14, of the defendant's charter. As the act was a ministerial and purely municipal one, Congress might accomplish it by conferring the power upon the District authorities. And this might be done in general words broad enough to comprehend the power without closely describing it.

2D.—THE POWER OF CONGRESS CONFERRED ON THE DISTRICT.

Defendant claims that full power to reduce the rental was included in the general words used in the act of March 3, 1873. The language applicable to this point is as follows:

> Appropriation is made of a sum "not exceeding seventy-five thousand dollars; the same to be applied by said District only *for the erection of a suitable building for the District offices*, and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, to make *arrangements to secure sufficient land* fronting on *Pennsylvania and Louisiana avenues*, between *Seventh* and *Ninth* streets: *Provided*, that the Government of the United States *shall not be liable* for any expenditures for said land, or for the purchase money therefor, or for the buildings to be erected thereon, and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon, for such building."

The following meanings are obvious from the language of the statute:

1. A sum not larger than $75,000 was to be applied in the *erection* of a District building.

2. The District authorities were empowered to make arrangements to secure a tract of land which is particularly described.

3. The United States would not refund money expended for said land.

4. The United States would not pay any part of the purchase money.

5. The United States would not pay for the buildings to be erected thereon.

6. The United States would not grant the land for such buildings.

By reference to the defendant's charter, section 2, it will be seen that the land described is none other than the front lot of the reservation granted in May, 1870, to the Washington Market Company, a fact which is specially averred in defendant's plea and admitted by the demurrer. It must be remembered that in March, 1873, the District of Columbia was a municipal and territorial government, clothed with powers of taxation and of legislation; that it was legally competent, under the organic act of February 21, 1871, to buy land for municipal purposes and to erect thereon buildings for District offices, and that it did not need further power in the matter, except for the acquisition of land over which Congress retained some rights. It might have lawfully bought without leave of Congress any other property on Pennsylvania avenue than the front lot of the Market Company reservation. To secure that involved dealing with a company chartered by the United States.

For this reason only did Congress legislate by granting power to make the necessary "*arrangements to secure.*"

This language was appropriate. The word "buy" or "purchase" would have been too narrow, for no cash was to be paid, and no absolute fee in land was to be acquired. With the peculiar and limited rights of the Market Company in view, no better phrase could have been found than the one which was adopted. "Arrangement" is defined by an eminent lexicographer: "final settlement, adjustment by agreement;" and this was precisely what was to be effected by the District authorities with the Market Company. The District authorities were left free to build wherever they chose, but if they thought it advisable to build on the front lot of the Market Company they were authorized to make arrangements to secure it. To whatever arrangement they might make, Congress gave its sanction in advance.

Counsel for plaintiff (see Brief, p. 34, a) claims that this authorizing act confers no right on the Market Company. "It is not even named in the act."

Answer. As the property of the Market Company is particularly designated as the land to be secured, it was unnecessary to name the company. There was nothing "sly" or "underhand" in the omission. It is not straining the conto infer that the "arrangements" were to be made with the owner of the lot.

The counsel, starting from false premises, comes logically to the conclusion that the act of March 3, 1873, was inoperative; that it meant nothing, and nothing could be done under it (Brief, p. 35). "The governor and board can make no arrangement, and that ends the matter." It is submitted on our side that the construction is plain, and the act one that conveys full power to the District authorities, and, by description of its lands, to the Market Company.

Courts construe such powers liberally, and in aid of the object of the grant.

Van Ness *vs.* City of Washington, 4 Peters, 280.
City of Georgetown *vs.* Alexandria Canal Co., 12 Peters, 97.
Washington City *vs.* Great Falls Man. Co., 21 Md.

"Powers expressly granted or necessarily implied, are not to be defeated or impaired by a stringent construction."

Smith *vs.* Madison, 7 Ind., 86; 8 Ind., 34.
Memphis *vs.* Adams, 9 Heisk., 518.

"It has long been an established principle in the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

Bridgport *vs.* Railroad Co., 15 Conn., 475, per *Church*, J. See also Glenn *vs.* Mayor, &c., of Baltimore, 5 G. & J., 424.

"In the case in 12 Peters, 97, the court held that the power to build a viaduct to carry the Alexandria Canal across the Potomac River at Georgetown was sufficiently conferred by an act of Congress authorizing the canal company to construct their canal from the terminus of the Chesapeake & Ohio Canal to Alexandria."

Hagner, J. (Appendix.)

3D.—THE DISTRICT AUTHORITIES REDUCED THE RENTAL.

This is specially averred in the special plea. Fifteen days after the passage of the act of March 3, 1873, the Governor and Board of Public Works, in pursuance of the authority granted to them, consummated arrangements to secure the lot described in that act by remitting a portion of the arrears of rental, and reducing the amount to be paid from April 1, 1873, to $7,500 yearly, the amount to be payable in quarterly installments instead of yearly, as prescribed in the statute. A contract was executed by the parties with the due formali-

ties. In compliance with the provisions and in consideration of said reduction and other covenants on the part of the District authorities, the Washington Market Company performed all its obligations in said contract. It executed and delivered a quit-claim deed in due form of all its right, title, and interest in said lot, placed the District in possession of it, settled up its rental in full, and has ever since paid rental, according to the contract, in quarterly installments.

All these facts are admitted by the demurrer.

What was done was, clearly, the natural and proper thing to be done, in view of all the circumstances. The District was entitled to receive $25,000 annual rental from the Market Company, beginning at a time not definitely fixed in the statute, either May 20, 1870, the date of the charter, or July 1, 1872, the date of finishing the market building and renting the stalls. The District would claim the former, and the company would claim the latter, on the ground that rental should not begin two years before revenue. There was probable cause here for litigation. This was arranged amicably by the settlement between the parties.

As the $25,000 rental was for the whole reservation, the District authorities would remit part of it on getting the front lot. It would have been an unbusiness like arrangement for the District to pay a large sum as purchase money of part of the property and continue to receive the rental for the whole. The adjustment made was the one that seemed fair to both parties.

Though made by the governor and board of public works, it appears to have been satisfactory to the Legislative Assembly. June 26, 1873, more than three months after the arrangement, that body passed an act (Rec., fol. 32,) appropriating the $75,000 received from the United States and $15,000 more, to be "drawn by warrant of the board of public works and *applied by them in the erection of a building for the District offices*," &c.

It is averred in the plea and admitted by the demurrer,

that the work of erecting said District building was commenced by said District.

In the financial crash of the Autumn of 1873, which may be alluded to as a matter of history, the erection of the District Building on the front lot was postponed. After the change of the District Government in July, 1874, that erection was abandoned. In November, 1875, the District Government conceived the idea of repudiating its contract, while holding on to all its resulting benefits, and of suing the Market Company for the balances due on the theory of the unbroken continuance of the original rental.

4th. *The plaintiff's ultra vires claim.*

The purchase of the front lot by the District, for the erection of a building for the District offices was a notorious one. The taking pos session of the lot by the District, the appropriation of $90,000 by the Legislative Assembly for the erection of the building by the Board of Public Works, the placing gangs of workmen on the lot to excavate the foundations for the proposed building; all these were notorious acts. The regular payment of rent by the defendant in quarterly installments, as required by the contract, was well known, being annually reported to Congress by the District Government. Yet, Congress made no complaint of the transaction; the Attorney General made no application for a writ of *quo warranto*, the District authorities filed no bill for rescission of the contract; and no citizen took any steps to test the validity of the arrangement made. For two years and eight months all parties interested acquiesced. At the end of that time, the new District Government sought to impeach the transaction in an indirect manner, by ignoring it and bringing an action as if its rights to the original rent were unimpaired. While admitting the facts of the acquisition of the land, and reduction of the rental, it now denies the legality of its own action, and of the action of the Market Company. It *retains the land and sues for the rent.*

This is repudiation, pure and simple.

In a private party, it would be fraud; in a public coporation, it is bad faith.

It is doubtful whether a case so shameless can be found in the reports. Many corporations have pleaded *ultra vires* to prevent the enforcement of contracts, but not one probably has ever sued for the rent of land while in its own possession.

There are some instances, however, in which a corporation has set up its own wrongful excess of charter power in order to retain both the property and its price. No such claim, it is believed, has been allowed by the higher courts to succeed. In the *Oil Creek & Allegheny River Railroad Co.* vs. *The Pennsylvania Transportation Co.* (2 Norris, 160), it was held that where a corporation has entered into a contract which has been fully executed on one part, and nothing remains for it but to pay the consideration money, it will not be allowed to set up that the contract is *ultra vires.* This judgment was unanimous and was but declaratory of the law as ruled in a number of earlier cases. In *Northampton County's Appeal* (6 Casey, 305), it was said by Porter, J.:

"A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity."

In the case of *Wright & Kemble* v. *The Antwerp Pipe Co. et al.*, 1883 (reported in 13 Pittsburgh, L. J. No. 25, p. 235), a suit brought on promissory notes given in consideration of certain stock duly delivered and accepted, the defendant corporations set up in defense that their charters prohibited the purchase of such stock. The lower court admitted the defense, but the appellate court reversed the decision and granted a new trial. The Court said:

"It may be that, as between the original parties, the defendant could have rescinded the contract and declined to receive the stock. But they executed it; they accepted the stock and gave their note in payment, for which note the plaintiffs paid value in good faith. The defense of *ultra vires* by a corporation comes with a better grace if made before it has discovered that it has made a bad bargain.

"If, as the defendant alleges, they have violated their charters, it is a matter that is within the cognizance of the Attorney General."

For the same principle applied to individuals, see *Lestapies* v. *Ingraham* (5 Barr, 81), *Hipple* v. *Rice* (4 Casey 406).

The case at bar appears to be pre-eminently one of the cases in which a court will use its ingenuity to prevent loss to the stockholders who were led into this arrangement "by the solicitations of the District officers" (see plea), and to the innocent purchasers of the company's stock between March 18, 1873, and November 23, 1875, and to prevent the loss by the company both of its real estate and money. Whether on the ground of part performance, or estoppel of the vendee to dispute the title of the vendor until the full consideration has been paid, or on the broader ground of estoppel *en pais*, this case can receive no favor at the hands of the court. Among the cases in which this court has enforced good faith, may be cited *Galloway* vs. *Finley*, 12 Peters, 264; Williams *v.* Watkins, 3 Peters, 43; Bush *v.* Marshall, 6 Howard, 284; *Knox Co.* vs. *Aspinwall*, 21 Howard, 539.

In the *County of Randolph v. Post*, 93 U. S. R., the court says: "We should unreasonably restrict the rights and powers of a municipal corporation, were we to hold that it did not possess the power to alter its legally made contract, by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract. Bigelow on Estoppel, 464; Moran *vs.* Commissioners, 2 Black, 722; Zabriskie *vs.* Cleveland, 23 Howard, 400; Pendleton *vs.* Avery, 13 Wall, 297; 1 Dillon Municipal Corporations, sections 375, 383, 385, 398."

Nor can plaintiff profit by the alleged claim that defendant acted ultra vires.

The District is estopped from disputing the competency of the Market Company to make the contract of March 18, 1873. Each party to a contract admits the competency of the other party to make it; and in the absence of fraud, or possibly mistake, the admission is conclusive. In an action by an infant on a contract with an adult, the latter cannot set up the former's incompetency.

Chic. & A. R. R. *vs.* Shea, 66 Ill., 471.
Curtiss *vs.* Waterloo, 38 Iowa, 266.
Franklin *vs.* Twogood, 18 Iowa, 515. See also 25 N. Y., 208; 19 N. Y., 119; 14 Johns., 238; 31 Ind., 268; 35 Ala., 33; 11 Cush., 285; 6 N. H., 164; Frost *vs.* Frostburg Coal Co., 24 Howard, 278.

The only *ultra vires* question in this case relates to the competency of the plaintiff to make arrangements to secure land.

Bill of Exceptions.

Conceding, for the sake of greater caution, that this court will consider the bill (18) taken at the trial of June 9, as in the case, the exceptions are not well founded. They are six in number.

1st. The presiding justice refused to allow the plaintiff to make *oral* proof of certain receipts alleged to have been given by defendant to stall-holders in its market for several years prior to the suit, beginning with its occupation. (20).

Answers.

(a) *Oral* testimony was not the best; (b) the form of receipts given to two or more of its tenants was immaterial to affect the obligations of the Market Company to the District; and (c) the offer to produce oral testimony to receipts similar to the one shown was ambigu-

ous; if *identical*, they were superfluous; if varying from it, the variations were not described either in number or nature.

2d. The defendant offered and read in evidence to the jury (28) a resolution of the Legislative Assembly, entitled "A resolution in relation to the Washington Market Company," approved August 23, 1871. Plaintiff objected, and was overruled. Exception taken.

Answers.

(a) Plaintiff showed no ground of objection or exception. (b) The resolution offered is mentioned in the special plea (10), and (c) also in the last clause, but one, of the agreement of March 18, 1873, between plaintiff and defendant. To put it in testimony was necessary to sustain the plea and explain the agreement.

3d. The defendant offered and read in evidence to the jury a copy, duly certified according to law, of the appointment, by the Secretary of the Interior, of appraisers, and of their fixing $75,000 as the value of the interest of the District of Columbia in the City Hall. Plaintiff objected and, being overruled, excepted.

Answers.

(a) Plaintiff showed no ground of exception or objection. (b) The testimony was necessary to sustain the plea (10.)

4th. Plaintiff offered to show by the oath of a professional accountant, that said accountant had recently examined certain books of account in the possession of said District, and that there were certain entries in said books (30.) Testimony refused. Exception taken.

Answers.

(a) The books themselves should have been produced. (b) Immaterial.

5th. The plaintiff excepted because the court refused to give the following instruction to the jury:

"That the plaintiff is entitled to recover from the defendant the sum of $25,000 per annum from the first day of January, 1871, when the company took possession, down to the first day of April, 1873."

Answers.

(a) As the declaration of plaintiff showed that between the dates named defendant had paid large sums on the rental account, the court could not instruct the jury as if not a cent had been paid.

(*b*) As there was not a spark of testimony tending to show that the Market Company had taken possession January 1, 1871, the court could not take that fact as proven.

6th. The sixth and last exception of defendant was to the language of the presiding judge, ending with "the duty of the jury, in my opinion, is to find a verdict for the defendant." (30).

Answers.

As the defendant had, under every part of the special plea which had been sustained by the general term, produced ample testimony, chiefly documentary and statutory, and the plaintiff had produced none in rebuttal, it is submitted that the language of the judge was strictly within his right, and that it is not shown to have done harm to the case of plaintiff. It was an *opinion*, not a *direction*.

THE PLAINTIFF'S BRIEF.

Among the documents not properly in this case is an alleged "memorial," printed in that brief, (page 12.) In the same category may be placed the nine-page alleged quotation from the Congressional Globe, beginning on page 25 and ending on page 33. In the act of March 3, 1873, there is no latent ambiguity requiring the aid of a Congressional debate

to clear it up. The only ambiguity claimed lies in the words "arrangements to secure," and upon these the debate throws no light whatever unless it be in the *rejection* of Mr. Beck's amendment, requiring a report from the Board of Public Works to Congress of its selection of land and the authority of Congress before any money could be expended.*

Plaintiff's counsel (p. 21) represents that the principal inducement of Congress to grant the Market Company's charter was to secure the erection of a block of private offices, stores, &c., on Pennsylvania avenue, and that Congress could not intend to permit the company to slip out from under this *great burden* (p. 37)—that is, the cost of erection. We might answer that the location is as desirable as any in the city; that the stores, offices, &c. would have rented at large prices, and that the principal inducement of Congress to grant the valuable privilege of owning such a profitable building was the agreement of the company to take charge of a troublesome market business. The answer would be as good as the argument.

Plaintiff's argument on the Statutes.

For answer to the argument of plaintiff's counsel contained in the last four pages of his brief, there is need of the application of only two principles of construction.

"Several acts *in pari materia* are to be construed as one statute in explaining their meaning and import." Patterson *vs.* Winn, 11 Wheaton, 385.

"What is implied in a statute is as much a part of it as what is expressed." 1 Black, 61.

*(p. 32.) The pages italicised in plaintiff's brief indicate a wish, not to explain any obscurity in the terms of the statute, but to cast a slur by innuendo upon the statements of one of the members of Congress. It is true that six years later the gentleman in question, who had long ceased to be a Representative, and was practicing the profession of law in this city, did appear before a Committee of Congress and make a professional argument against the repeal of defendant's charter. His statement in 1873 (p. 29) in regard to the Board of Public Works was strictly true. *Not a single member of that Board owned a dollar's interest in the market property* or in the stock of the Company. One had owned some stock, but had sold it in the preceding year.

(*See sworn testimony in the case of Hoffman* vs. *The Washington Market Co.*)

Let us reconstruct, in the light of these principles, the second section of the Market Company's charter, to the end of the description of the land, adding the important part of the act of March 3, 1873, and the result will be a consistent and intelligible statute. The form might be as follows:

"SEC. 2. *And be it further enacted*, That said [Market] company is hereby authorized and empowered to locate and construct a suitable building or buildings upon the Centre Market space, fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets. A sum of $75,000 is hereby appropriated to be paid to the District of Columbia, which shall apply the same only for the erection of a suitable building for the District offices; and the governor and board of public works are authorized, if they deem it advisable for that purpose, to make arrangements to secure [from said Market Company] a sufficient quantity of the above described land: *Provided*," &c.

Any other interpretation makes the act of 1873, meaningless, inoperative and deceptive. This one reconciles the two statutes mak s and them operative.

To the arguments drawn from the want of wisdom or expediency in the arrangement, no answer is needed; the question of power in the District Authorities is the only one which will be considered by the court.

See Randolph *vs.* Post, 93 U. S. N., 511.

The terms and consideration of the arrangement are outside of this controversy.

I respectfully submit that plaintiff cannot recover.

WILLIAM BIRNEY,
Defendant's Attorney.

March 1, 1883.

APPENDIX.

DATES OF LEADING FACTS.

1870, May 20, Charter of Washington Market Company.

1871, August 23, Act of Legislative Assembly, directing Commissioner to secure the reduction of Market Company's annual rental from $25,000 to $20,000.

1872, July 1, Market House finished.

1873, March 3, Congress appropriates $75,000 for the erection of a building for District offices, and authorizes the Board of Public Works to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana Avenues, between 7th and 9th streets, the United States not to be liable for expenditures for land, purchase money or buildings.

1873, March 18, the Board of Public Works makes contract with Market Company.

1873, March 18, Washington Market Company deeds its interest to the District of Columbia.

1873, March 22, Deed recorded. District takes possession of land.

1873, April 1, Market Company settles and pays up the sum agreed upon as past rental.

1873, June 26, Legislative Assembly appropriates $90,000 for the erection of a building for District offices, the sum covering the $75,000, directed by Congress to be applied to that purpose.

1873, July 1, District authorities begin on the land excavations for a District Building.

1874, July 20, District Government by Commissioners organized.

1875, November 23, Declaration filed in present suit.

Mr. Justice Hagner delivered the opinion of the General Term in this case as follows:

"The case is one of great importance as well by reason of the amount claimed as because of the numerous and interesting questions involved. These have been argued with great ability, and they have received the careful consideration their importance demands.

The action was commenced in November, 1875, in the name of the District of Columbia against the Washington Market Company. The declaration contained two special counts, and the usual money counts for money payable, &c. In the first count the pleader undertakes to set out the 14th section of the act of Congress of 1870, incorporating the Market Company. With this declaration was filed a bill of particulars claiming a balance due the District of over $53,000.

In January, 1876, the defendant filed a general plea of not indebted, and in April following a special plea in the following words:

[The plea is printed in the foregoing brief.]

The plaintiff filed a demurrer to this special plea, and a note of the matters of law intended to be argued under it as follows:

(1.) That the act of the Legislative Assembly, in said plea mentioned, does not reduce the annual rental required by act of Congress to be paid by the defendant.

(2. That the Legislative Assembly had no authority to so reduce said annual rental.

(3.) The defendant did not and could not make a valid conveyance of the land alleged in said plea to have been conveyed by the defendant to the plaintiff; said land being held by the defendant under a statutory lease from the United States, and subject to certain trusts.

(4.) Neither the Board of Public Works nor the District of Columbia was authorized by the act of March 3, 1873, in said plea mentioned, to buy the land alleged in the plea to have been bought from the defendant, the reversion of said land being in the United States.

The scope of the argument extended beyond these four causes, and as the parties evidently desire a decision upon all the points raised, we propose to examine them in their due order.

FIRST. Did Congress possess the constitutional power to reduce the rent exacted by section 14 of the act of 1870?

It is important to consider the situation of this property when this act was passed. This reservation then belonged exclusively to the United States. According to the decision in 4 Pet., of Van Ness *v.* City of Washington, the United States possessed it free of all trusts, untrammeled by all conditions, with the right to do with it whatever any private proprietor in the city could do with his land, or whatever the United States could do with any other Government lands. It could, therefore, have *sold* it and placed the proceeds in the Public Treasury. It could have *given it away absolutely*, as it has given away millions of acres to railroads, to meritorious officers and soldiers, or to any charitable object; as a matter of course, therefore, it could *lease* it, reserving such annual rent as it should see fit to claim, from $100,000 to $25,000, or for a consideration as insignificant as the two Indian arrows, the price of the grant of Maryland from Charles II. It could make *that rent* payable either directly into the treasury, or to a private individual, or to an appointee for the use of any beneficiary it might select, as it did in this case. It cannot be denied that if the rent had been reserved, *payable directly into the treasury*, Congress might afterwards have reduced or released it, as a private person might release a rent payable to himself. Does the fact, that by the act of Congress itself the Market Company was directed to pay the money to the city of Washington, remove the rent beyond control of the power that created it?

It must be admitted that the reservation of the rent to the city was a mere *gratuity* on the part of Congress towards this municipality, bestowed *without the slightest consideration* moving from the city to the United States, as purely a *bounty* as were any of the royal grants to the colonial territories by the "special grace, certain knowledge, and mere mention" of the English kings, and it is well settled that bounties are within legislative control, and always subject to be withdrawn by the power that conferred them. Of this character are the pensions granted by Congress, or appropriations for charities, which are subject at all times to be withdrawn by

the sovereign, however severely such withdrawal might operate upon individuals. By law, goods seized for violations of the customs duties are liable to forfeiture; and to stimulate vigilance on the part of the revenue officers, a valuable part of the forfeiture is assigned to them. But as the Secretary of the Treasury is authorized, in his discretion, to remit the penalty, the Supreme Court has held that his remission also releases the share of the collector; and that there can be no such vested right in him as to his moiety as may not be fully destroyed by the act of the Government.

An illustration of this principle as affecting individuals is afforded by the decision in Salt Co. *vs.* East Saginaw, 13 Wall., 373.

But there is a special reason why this right to destroy or diminish a gratuity applies where a *municipality* is concerned.

A city is one of the public territorial divisions of the country, established for public political purposes, connected with the administration of the Government. It is one of the instruments of government, invested with local jurisdiction to aid in the administration of public affairs. Such a municipality is *always* the subject of legislative control as to its duration, powers, rights and property. In a *public* capacity only could it receive this money, to be used by it for public purposes only. From numerous cases at hand, uniformly maintaining this proposition, I will refer to a decision in Maryland, of Hagerstown *vs.* Sherer, 37 Md., 180.

In this case the court, in discussing this subject, say: "The case of State, use of Washington County, *vs.* B. & O. R. R. Co., 12 G. & J., 299, is a very instructive one as to the power the legislature may exercise over the supposed rights of such corporations. The legislature, in an act to promote internal improvements, had inserted a proviso, that if the railroad company did not locate their road so as to pass through Hagerstown, they should forfeit one million of dollars to the State, *for the use of Washington county.* The company failed to make the designated location, and suit was then brought against them in the name of the State, for the use of the county, to recover this sum. The legislature then passed an act releasing this forfeiture. The validity of this latter act was assailed, but was sustained by the court. * * In that part of their opinion where they treat the case as one of contract and not of penalty, they say, in this view of the case, "it is material to consider who are the contracting par-

ties, and in what relation does the *cestui que use* stand to the legal plaintiff, on the record. The contracting parties are the State on the one part and the railroad company on the other. The considerations of the contract were the franchises and privileges derived by the company from the State, and the *cestui que use* is *one of the counties of the State* claiming an interest incidentally in her political character and capacity in virtue of one of the provisions contained in that contract.

The State, for reasons which she deemed sufficient, has thought proper, by an act of her legislature, to *annul the contract and release the claim* of the *cestui que use*, which this action has been instituted to enforce. In doing so the legislature have not transcended their constitutional limits. Washington county, by which the claim is attempted to be enforced, is one of the public territorial divisions of the State, established for public purposes, connected with the administration of the government. In this character she would receive the money as public property, to be used for public purposes only, and not for the use of her citizens in their private characters and capacities. In that relation they would have no immediate interest and could assert no title. * * If, then, it be public and not private property, it would seem to be completely at the disposal of the government, and the act of 1840 was nothing more than a rightful exercise of legislative power." This judgment was affirmed by the Supreme Court, in 3 How., 534, where it was held, that by the repealing act, the legislature had dealt altogether with matters of *public* concern and had interfered with no *private* right, because neither the county commissioners nor the county, nor any one of its citizens, had acquired any separate or private interest in this money, which could be maintained in a court of justice.

If further countenances, for the exercise of the right were needed, it might be gathered from the provision in section 17 of the charter of the Market Company, reserving the right of Congress to legislate in respect to said property, and from the opinion of the Supreme Court in Welch *vs.* City Collector, not yet reported. [97 U. S., 541.]

We have, therefore, no doubt that Congress did possess the power to reduce the rental. It must be admitted that it was not essential that this reduction should be made by *an act of Congress*, and by explicit words Congress might equally accomplish the end by authorizing the District of Columbia,

the successor of the city government, to release or reduce the rents, and this power might be confided to them by *general words* large enough to comprehend the powers though not explicitly *describing it.* Welch *v.* City Collector, supra.)

SECOND. The question then arises—Did Congress confer such authority upon the District government?

It is claimed on the part of the Market Company that the authority is given to the District government by the act of Congress of 3d March, 1873, while the counsel for the District insists that this act confers no such authority.

The language of the section applicable to this point is as follows:

"For the purchase by the United States of the interest of the District of Columbia in the present City Hall building in Washington, now used solely for Government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by the said District only for the erection of a suitable building for the District offices; and the governor and board of public works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues, between Seventh and Ninth streets: Provided, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon, for such building," 17 Stats., 540.

It has been insisted in the argument that the court, with a view to a clearer understanding of the language used in the section, is at liberty to consult the record of the debates in the Houses of Congress while this section was under discussion. It is true that the courts, in the examination of certain constitutional questions, have at times referred to the essays in the Federalist, written by the great founders of the instrument, contemporaneously with its submission to the people, and have cited the opinions of those eminent men in support of their conclusions. It is also true that in New York and in some other States it has been considered proper to examine the journals of the legislature, to ascertain

whether a particular measure received the two-thirds vote required by the State constitution for that class of laws. But we have seen no authority that would justify us in appealing to so uncertain a source for guidance as the remarks of members in debate. It is well known that a measure is sometimes advocated by a person upon grounds which another may assign as the cause of his opposition. And in this case there can be no more striking proof of the fallacious character of such evidence than the fact that both sides refer to different portions of the same debate in support of their respective views.

If reference were to be had to any portion of the Congressional record, it would be more justifiable to examine the amendments proposed to the section by different members and among them to the proposal of Mr. Beck, of Kentucky, that no money should be expended upon the property selected by the governor and board of public works until authority should be first given by Congress after a report to that body. This amendment was rejected; but it may be urged with equal plausibility on the one hand that Congress rejected it because it determined to vest the final power in the city authorities, and, on the other, that the reason for the rejection was the belief that the law only authorized an inquiry or preliminary treaty about the land. We are, therefore, forced to examine the language itself unassisted by extraneous aids.

It is evident that the principal matter sought to be provided for *was the erection of the building*, but the power to accomplish this is not granted by direct language. It is also evident that the act contemplated the possibility of some "expenditure for the land" and "payment of purchase-money therefor," for it expressly takes pains to declare that the United States shall not be liable for either. The particular phrase which has been the great source of discussion declares that the governor and board of public works are authorized (if they deem it desirable) for the purpose "to make arrangements to secure sufficient land," &c.

"It is insisted by the counsel of the District that the words "make arrangements" only imply the grant of power to make a treaty or bargain as to the price, terms, &c., and to report their action to Congress; and definitions are read from an eminent lexicographer, (a justifiable source of reference), which ascribe this signification to the word "arrangement." But the same high authority gives the following as one of

the significations: "*Arrangement*—final settlement—adjustment by agreement—as the parties have made arrangements between themselves concerning their dispute," and it is added that this is "a popular use of the term." Now, if we substitute this definition where the word occurs in the act, the sentence will read thus: "The governor, &c., are authorized to make a final settlement, or adjustment, by agreement, to secure sufficient land," &c.

With this sense (the popular sense, we are told,) given to the word, the phrase would certainly confer an authority upon the District of Columbia to take all needful steps to consummate the acquisition of the described territory, even to the extent set forth in the plea. The propriety of adopting this form of expression in the act of Congress instead of directing the District government to buy the land, can readily be appreciated when we reflect that any mandatory direction to purchase would have committed the District to place the buildings on the lots, however extortionate might be the demand of the Market Company as to the price.

It is difficult to understand why Congress should have desired the delay of another year for the return of the report and further Congressional action, in view of the fact that the power of acquiring this parcel of land was not one of very uncommon importance, not greater than similar powers constantly conferred by individuals upon private agents, and not comparable in consequence to the immense powers previously and subsequently confided by Congress to the District government with unstinted hand, and in virtue of which millions of money were expended, and the whole face of the city changed and levelled.

To show that the courts construe such powers liberally, and in aid of the object of the grant, we refer to Van Ness *v.* City of Wash, 4 Peters, 280; City of Georgetown *v.* Alexandria Canal Co., 12 Id., 97; Washington Corpo. *v.* Great Falls Manf. Co., 21 Md.

In the last-named case it appeared that an act of the legislature of Maryland declared "that if the plan adopted by the President of the United States for supplying the City of Washington with water, should require said water to be drawn from any source within the limits of the state, consent is hereby given to the United States to purchase such lands, and to construct such dams, reservoirs, buildings and other works, and to exercise, concurrently with the State of

Maryland, such jurisdiction over the same as may be necessary for the said purpose."

In constructing the Washington acqueduct, it was found necessary to build a dam across the Potomac river at a point where the land on both banks belonged to the Great Falls Manufacturing Company. After the building of the dam the Great Falls Company obtained from the State of Maryland patents for the land at the bottom of the river, upon which the dam was built, and it was insisted that it was entitled to payment from the United States, in respect of the land thus patented and used by the acqueduct. The Court of Appeals, however, held that the act of the legislature conferred upon the United States rights of acquisition of the lands necessary for the construction of the acqueduct which the State was not at liberty to impair, by acts of its public officers, and that the United States, by its priority of location had secured a priority of right, which must prevail against the subsequent patentee.

In the case in 12 Peters, 97, the court in like manner held that the power to build a viaduct to carry the Alexandria canal across the Potomac river at Georgetown, was sufficiently conferred by an act of Congress authorizing the canal company to construct their canal from the terminus of the Chesapeake and Ohio Canal to the city of Alexandria.

We, therefore, conclude that Congress did, by the fair interpretation of this section of the act, intrust to the District Government the power to adopt and *conclude* all requisite measures to acquire the land described in the law, as the site of the contemplated public buildings.

THIRD. The next question is, did the city authorities exercise this power in the manner authorized by the law?

What the authorities actually did is averred by the plea and admitted by the demurrer. They acquired by deed from the Market Company the parcel of land, 86 feet in depth, described in the plea, and in consideration of this grant, they agreed to reduce the rental to $7,500, in the manner specified in sec. 2 of the agreement.

Their power to acquire this land is denied by the plaintiff, who claims that these acts on its part were *ultra vires* and void.

In considering the power of a municipal corporation to do any act appearing to have been performed in the direction of the public welfare, the courts are not inclined to con-

strue its powers parsimoniously, and scrutinize and restrain them within the strictest limits; but they will expound them liberally to effect the valuable public purposes entrusted to it by the legislature.

In Glenn *v.* Mayor and City Council of Baltimore, 5 G. & J., 424, the court hold this language: "A municipal corporation has power to pass all laws necessary or proper to carry into effect any given power, and the degree of their necessity or propriety should not be minutely scrutinized." And the doctrine of *ultra vires* when invoked by a municipality to enable it to avoid its own solemn engagements, is rightly discountenanced by the courts. It is well for the honor and safety of the nation that its highest court, in unmistakable terms, has reiterated its determination to maintain the faith of contracts entered into by corporations and especially by municipalities where the only defense interposed is the allegation by the city that it misled others by exercising powers it now insists it did not possess. Unless such defences were listened to with great caution, it might result in each successive government of a municipality in turn endeavoring to repudiate the act of its predecessor, and thus the board that sought to evade the entire contract as *ultra vires*, might in turn be denounced as having usurped authority in seeking its disaffirmance.

A *release* of part of the rent was the most obvious mode of accomplishing the acquisition of the property. It would have been a most extraordinary arrangement for the corporation to have paid out money for the land of the Market Company, and for the Market Company to have continued to pay the entire original rental, after having parted with a large part of the reservation to the city.

That the municipality had the power to receive the land and execute the release, in our opinion, is fully sustained by the authorities.

A case which strikingly maintains this view of the power of the corporation to execute this release is reported in 23d Maryland, 629; Visitors, &c., of St. John's College v. Purnell, Comptroller, &c.

In 1784, St. John's College was incorporated by the State of Maryland. By the act of incorporation it was declared that in consideration that certain public spirited individuals had subscribed a large sum of money towards founding a college, the State of Maryland bound itself to pay annually and forever thereafter, as a donation by the public to the

use of the said college, the sum of £1,750, "to be applied by the visitors and governors to the payment of salaries to the principal, professors and tutors," &c., and the act proceeded to dedicate to the payment of this annuity, a sufficient amount from the sums to be received into the Treasury from licenses.

In 1805 the legislature passed an act declaring this provision of the charter repealed. In 1832 a resolution was passed by the legislature declaring that hereafter there should be paid annually to the visitors and governor the sum of $3,000, *on condition* that this annuity should be accepted by them in full satisfaction of all legal or equitable claims they might have or be supposed to have, against the State under the original law; and requiring them to file an acceptance of these conditions with the clerk of the court of appeals, and the college authorities executed an instrument under their corporate seal, agreeing to accept the annuity in full satisfaction of their claims; and it was paid to the college for many years thereafter.

In 1860 the visitors and governor sued out a mandamus, to compel the officers of the treasury to pay out the money received from licenses, the original annuity of £1,750, from the time it was withdrawn, averring that the attempted repeal in 1805 was void as against the provisions of the Constitution of the United States forbidding a State to pass any law impairing the obligation of a contract (as had already been decided in 15 Md., 330), and insisting further that the release executed by the College authorities, in 1832, was *ultra vires* and void.

After the fullest argument by counsel, the Court of Appeals decided that the visitors and governor were competent to execute the release, and that they were concluded thereby, and could not maintain their action.

We are thus led to the conclusion, which is concurred in by all the members of the court who heard the cause, that the defences interposed by the special plea, and admitted by the demurrer, constitute a bar to this action.

The questions we have examined are all that properly arise in the consideration of the case presented by the pleadings. With the consideration so much discussed in the argument, as to the alleged unwisdom or imputed imprudence of the arrangement, this court can have nothing to do. This is not an application to a court of equity on the part of the city, to reform an overreaching bargain imposed upon

inexperience or ignorance. It is an action brought by one party for a stipulated rent, upon a contract, which the defendant alleges has been lawfully changed by a subsequent competent agreement between the original contracting parties. The only question for the decision of this court, therefore, is whether this subsequent agreement was entered into by competent authority, as alleged. Our province is simply to declare the law, as in our judgment we find it to be.

But it may not be amiss for the court to say that we fail to discover some of the apprehended evils which it was urged would result to the city from its settlement with the Market Company. There is nothing whatever in the negotiations which could be construed as committing the District to erect buildings in the form contemplated by the original charter of the Market Company. The agreement simply operates to reduce the rental to be paid by the Market Company to $7,500, or to such lesser sum as, with the taxes on the company's property, will amount to $13,000 per annum. It creates no obligation, as we construe it, upon the part of the District of Columbia, to raise by taxation the $17,500 (the difference between the original and reduced rental) for the use of the poor of the District and the city. For, even if the District of Columbia were effectually substituted for the Market Company, in the 14th section of the charter, the operation of the section would then simply be to require the District to pay the money to the District itself, which would work an extinguishment of the rent, upon the principle that where the lessee acquires the fee, the rent ceases, and the lease-hold title is merged in the fee. See 20 Md., Cook *v.* Brice.

We go further, however, and declare as our opinion that if this were not so, and if the District of Columbia could be held liable to raise the money annually, in a case where the trust was one which could be enforced by law, yet, that there could be no such obligation in the present case, where the designation of the beneficiaries, "the poor of the city of Washington and of the District of Columbia," is so vague and indefinite as to be incapable of ascertainment, and no persons could show title to claim the benefit of the fund in succession. According to the law governing this District at the time of its cession, such a trust was totally void, as it was in England after the statutes of mortmain and until the passage of the 43d of Elizabeth, concerning charitable uses.

It is settled beyond dispute in Maryland that the statutes of Henry VIII were always in force in that province and State, and they have been reiterated in spirit by the bill of rights of every constitution since the year 1776; and that the statute of Elizabeth never was adopted nor its principles recognized there. See Wildeman *v.* Mayor, &c., of Baltimore City, 8 Md., 551; and see the cases from 3 H. & McH. 333, Lingan *v.* Carroll, decided in 1793, to 30 Md., 142, Means *v.* Marche; see, also, Barnes *v.* Barnes, 3 Cranch, C. C., 269; Baptist Asso. *v.* Hart, 4 Wheat., 1; Beatty *v.* Kurtz, 2 Pet., 566.

These views are not inconsistent with the decisions of the Supreme Court upon the different state of facts appearing in Inglis *v.* Sailor's Snug Harbor, 3 Pet., 113; Girard's Will, 2 How.; Ould *v.* Washington Hospital for Foundlings, 1 Mac Arthur, 541; and Fontain *v.* Ravenel, 17 How., 394.

Upon these grounds the court have unanimously determined that the judgment of the court in special term, overruling the demurrer, should be affirmed.

Several of the objections insisted on in the argument, but which could not properly be considered under the demurrer, as that the land selected was not that described in the act of Congress, that it was not a suitable place, &c., together with any other defences that the able counsel of the plaintiff may decide to present, may be insisted on by replication to the plea, if they are so advised.

It is a satisfaction to the court to know that whatever errors we may have fallen into may be the subject of review by the highest tribunal in the land.